No. 86-1967

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

WILLIAM P. TAVOULAREAS,
Petitioner,
v.
THE WASHINGTON POST COMPANY,
and
PATRICK TYLER,
Respondents.

WILLIAM P. TAVOULAREAS,
Petitioner,
v.
PHILIP PIRO,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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Opinion of the District Court

UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

Civ. A. Nos. 80-3032, 80-2387.

May 2, 1983.

WILLIAM P. TAVOULAREAS, et al.,

Plaintiffs,

v.

THE WASHINGTON POST COMPANY, et al.,

Defendants.

WILLIAM P. TAVOULAREAS, et al.,

Plaintiffs,

v.

PHILIP PIRO,

Defendant.

MEMORANDUM

GASCH, District Judge.

Plaintiffs, William P. Tavoulareas and his son Peter, filed suit in this case against defendants, The Washington Post Company (WPC), Patrick E. Tyler, Sandy Golden, Benjamin C. Bradlee, and Robert U. Woodward.[1] Plaintiffs

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[1] Plaintiffs also included Katharine Graham, Chairman of the Board and Chief Executive Officer of The Washington Post Company, in their original complaint but on September 10, 1981, this Court entered summary judgment in her favor dismissing her from the case.

claimed that they were libeled by two articles concerning the establishment of Atlas Maritime Corporation and its relationship with Mobil Oil Corporation published in *The Washington Post (The Post)* on November 30, 1979 and December 1, 1979. Defendant Tyler, an investigative reporter for *The Post*, wrote the stories aided by defendant Golden, a freelance reporter who contributed to the first article and was designated in it as a "special correspondent." Basically, the complaint alleged that these articles falsely suggested that William Tavoulareas, the president of Mobil, used his influence to set up and maintain his son Peter in Atlas, a London-based shipping firm. On July 30, 1982, a jury found that defendants WPC, Tyler and Golden had libeled the elder Tavoulareas in the November 30 article.[2] They awarded him $250,000 in compensatory and $1.8 million in punitive damages.[3] This matter is currently before the Court on the defendants' alternative motions for judgment notwithstanding the verdict (n.o.v.), new trial or reduction in the amount of the judgment.[4] For the reasons discussed below, the Court finds an insufficient evidentiary basis to support the jury's verdict and, therefore, grants defendants' motions for judgment n.o.v.

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[2] The jury found that Bradlee and Woodward were not liable to either of the plaintiffs; that WPC, Tyler, and Golden were not liable to William Tavoulareas for the publication of the December 1 article; and that WPC, Tyler, and Golden were not liable to Peter Tavoulareas for either of the two articles.

[3] The jury assessed the compensatory damage award against defendants WPC, Tyler and Golden but the punitive damage award was assessed only against defendant WPC.

[4] In the consolidated case of *William P. Tavoulareas v. Philip Piro*, Civil Action No. 80-2387, the jury found defendant Piro liable to both Tavoulareases for slander. They awarded Peter $1,000.00 and William $5,000.00 in compensatory damages. Currently pending before the Court, but not addressed in this opinion, is defendant Piro's motion for judgment n.o.v.

District Court Opinion

I. *The Standard for Judgment n.o.v. Under Rule 50(b) of the Federal Rules of Civil Procedure*

Defendants bear a heavy burden of proof on their motions for judgment n.o.v. A trial court may grant such a motion only when "the evidence, together with all inferences that can reasonably be drawn therefrom is so one-sided that reasonable men could not disagree on the verdict." *Vander Zee v. Karabatsos*, 589 F.2d 723, 726 (D.C.Cir.1978), *cert. denied*, 441 U.S. 962, 99 S.Ct. 2407, 60 L.Ed.2d 1066 (1979). A court may not evaluate the credibility of the evidence and if there is conflicting evidence present in the record, the motion may not be granted. 5A J. Moore, *Moore's Federal Practice* ¶ 50.07[2] (2d ed. 1982). If, however, the nonmoving party has presented only a "mere scintilla" of evidence at trial, the verdict may not stand. *Pennsylvania R.R. Co. v. Chamberlain*, 288 U.S. 333, 343, 53 S.Ct. 391, 394, 77 L.Ed.2d 819 (1933); *Murray v. Towers*, 239 F.2d 914, 915 (D.C.Cir.1956); *Riss & Co. v. Association of American Railroads*, 187 F.Supp. 306, 312 (D.D.C.1960).

Technically, a motion for judgment n.o.v. is merely the renewal of a motion for directed verdict made at the close of all the evidence. 9 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2537 at 596 (1970). The standard for granting a judgment n.o.v. is, therefore, the same as the standard for awarding a directed verdict.[5] *Id.* at 599. *See Lester v. Dunn*, 475 F.2d 983, 985 (D.C.Cir.1973).

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[5] A motion for directed verdict may only be granted when all the evidence

> . . . along with all inferences reasonably to be drawn therefrom, when viewed in the light most favorable to the plaintiff is such that reasonable jurors in fair and impartial exercise of their judgment could not reasonably disagree in finding for the defendant . . .

Alden v. Providence Hospital, 382 F.2d 163, 165 (D.C.Cir.1967).

II. *Actual Malice and the Public Figure Plaintiff*

Just as the defendants at this stage of the proceeding face a stringent test for the successful maintenance of a motion for judgment n.o.v., plaintiff faced a substantially different, but equally difficult, task at trial. On June 30, 1982, this Court held that William Tavoulareas was to be considered a public figure for purposes of this trial.[6] As a result of this ruling, plaintiff had to establish by *clear and convincing* evidence, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342, 94 S.Ct. 2997, 3008, 41 L.Ed.2d 789 (1974),[7] that the defendants published the November 30 article with "actual malice." In this context, plaintiff must show that *The Post* published the article either knowing at the time of publication that it was false or with reckless disregard of its truth or falsity. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S.Ct. 710, 725-26, 11 L.Ed.2d 686 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. at 342, 94 S.Ct. at 3008.

The Supreme Court first developed the actual malice standard in *New York Times Co. v. Sullivan*.[8] Emphasizing the importance of uninhibited, robust discussion on public issues, the Court noted that such discussion might include "vehement, caustic, and sometimes unpleasantly sharp attacks" on certain public officials. *Id.* at 270, 84 S.Ct. at 721. Despite the fact that some of these attacks may be

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[6] On July 17, 1982, this Court held a further hearing on the public figure status of William Tavoulareas in order to reconsider its June 30 ruling. On July 26, 1982 the Court issued a memorandum adhering to the earlier ruling.

[7] *See also Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52, 91 S.Ct. 1811, 1824, 29 L.Ed.2d 296 (1971); *Waskow v. Associated Press*, 462 F.2d 1173, 1175 (D.C.Cir.1972); *Logan v. District of Columbia*, 447 F.Supp. 1328, 1331 (D.D.C. 1978).

[8] *Sullivan* involved a public official plaintiff rather than a public figure plaintiff but the basic lesson to be gleaned from that case is the same.

erroneous and defamatory, the Court held that statements of this variety must be protected if the First Amendment is to retain its vitality. *Id.* at 271-72, 84 S.Ct. at 721-22. In subsequent decisions, however, the Court excluded one type of defamatory speech from constitutional protection. In *Garrison v. Louisiana*, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964), the Court explicitly held that the calculated falsehood, "the lie, knowingly and deliberately published about a public official", makes no contribution to society's vigorous interchange of ideas and is, therefore, beyond the constitutional pale. *Id.* at 75, 85 S.Ct. at 216.

Under the standards enunciated by the Supreme Court, therefore, the jury verdict in this case will withstand the motions for judgment n.o.v. only if there is sufficient evidence in the record from which a jury could reasonably find, by clear and convincing proof, that the defendants published the November 30 article with actual malice.[9] The article in question falls far short of being a model of fair, unbiased, investigative journalism. There is no evidence in the record, however, to show that it contained knowing lies or statements made in reckless disregard of the truth. Reviewed under the stringent test set forth by the Supreme Court in *New York Times Co. v. Sullivan*, the verdict in plaintiff's favor must be set aside.

III. *Plaintiff's Arguments in Support of the Verdict*

As a preliminary matter, it should be noted that this article was neither "fabricated" by the defendants nor was

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[9] Of course, plaintiff also had to prove that the allegedly libelous statements were false. At trial, in opposition to plaintiffs' claims that many of the statements in the articles were false, defendants steadfastly maintained that every word in both articles was true. Because the Court finds that there was no proof of actual malice, it does not have to address this question directly.

it based merely upon the imaginations of two newspaper reporters. *See St. Amant v. Thompson*, 390 U.S. 727, 732, 88 S.Ct. 1323, 1326, 20 L.Ed.2d 262 (1968). Despite the fact that certain portions of the story may have been "slanted," the record clearly reflects that Tyler expended a large amount of time and effort on its preparation. Among others, he interviewed George Comnas, the first managing director of Atlas, John Kousi, a Saudi Maritime Company (Samarco) director, and Lewis Lapham, a member of the Mobil board of directors. He researched the oil tanker management business and reviewed documents from the Federal Maritime Commission, the Subcommittee on Energy and Power of the Committee on Interstate and Foreign Commerce of the United States House of Representatives, and the Securities and Exchange Commission (SEC). Tyler attempted to speak to high level Mobil executives and to William and Peter Tavoulareas on a number of occasions but they consistently rebuffed his efforts. Mobil ultimately responded to Tyler's requests by furnishing him with written responses to his inquiries, and he included most of this information in the article.

This undisputed evidence of Tyler's extensive preparation is not dispositive, however, of the issue of actual malice. A reporter cannot shield himself from a charge of reckless disregard merely by showing that he invested a large amount of time and effort on an article's preparation. Plaintiff has provided four major bases from which he contends the jury could have properly found that the defendants acted with actual malice. Each of these contentions is addressed below.

A. *The Christine Peterson Memorandum*

At the time *The Post* published the November 30 article, the newspaper employed Christine Peterson as a copy editor. At trial she described her duties as follows:

> A copy editor is a [sic] last person on the news room floor to see a piece of copy report [before it] goes into the composing room to be set into type. The copy editor basically edits a story for style, punctuation, grammar, checks what facts can be checked, with source material at hand, things like the population of the State of Utah or the area of Lake Superior, that sort of thing.

Trial Transcript at 2827. Ms. Peterson had the task of performing this "final edit" on the November 30 article. On November 27 she took the rather unusual step of writing a memorandum to her superior, Peter Milius, and discussed certain problems she had with Tyler's story. She stated that:

> I've read the Mobil story several times, and while I'm impressed with the amount of work the reporter obviously did, I'm still left with an overwhelming sense of So What? Is there any way to give this story of high-level nepotism a dollars-and-cents angle? Did Mobil's shareholders lose anything? Mobil's customers? Parts of Tyler's case against Tavoulareas seem tenuous, and the whole—a $680,000-a-year plaything for an indulged son, at worst—just seems like a withered peanut in an 84" gilded shell.
>
> A far more interesting angle, it seems to me, is Mobil's concern about Saudi preference shipping—a concern so profound that it led to the formation of an entire dummy corporation. *It's impossible to believe that Tavoulareas alone could put together such a scheme for the sake of his son's business career, or that he would want to.*

Pls.' Exh. 542 (emphasis supplied).

Plaintiff contends that the underlined portion of the memorandum alone could serve as a proper evidentiary basis for the jury's finding of actual malice because one editor explicitly stated to another that the major premise of the article was "impossible to believe." He claims that this proves that *The Post* published the article despite the fact that one of its editors had substantial doubts about its accuracy.

The defendants have advanced a strained interpretation of the memorandum in an attempt to show that Ms. Peterson did not actually mean that she found the article impossible to believe. On this motion for judgment n.o.v., however, the Court must examine all the evidence in the light most favorable to the plaintiff, and, therefore, defendants' version must be rejected. Nevertheless, no matter how this memorandum is construed, it does not prove that *The Post* acted with actual malice.

Ms. Peterson was a copy editor and her primary responsibility was to fine tune the article grammatically *after* its substance had been examined by other editors. There is no evidence whatsoever to show that Ms. Peterson had any "inside" information about Tyler's sources or research that would enable her to know, or even suspect, that the story was inaccurate. She was merely expressing her uninformed opinion that she found the story hard to believe.

If Ms. Peterson had investigated the article's substance and sources and thereafter had expressed a similar statement of doubt as to the article's veracity, plaintiff's argument might prevail. Plaintiff, however, has offered no evidence to this effect. The actual malice test focuses on the state of mind of the author and publisher of the allegedly libelous statements. Ms. Peterson's memorandum does not show that those who were responsible for the article's sub-

stance entertained any doubts whatsoever about its accuracy.

B. *The Reliability of George Comnas and Philip Piro as Sources*

One method of proving that a libel defendant acted with actual malice is to show that he had "obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *St. Amant v. Thompson,* 390 U.S. at 732, 88 S.Ct. at 1326. *See also Curtis Publishing Co. v. Butts,* 388 U.S. 130, 169-70, 87 S.Ct. 1975, 1998-99, 18 L.Ed.2d 1094 (Warren, C.J., concurring in the result) and 172 (Brennan, J., dissenting) (1967); *Carey v. Hume,* 492 F.2d 631, 637 (D.C.Cir.), *cert. dismissed,* 417 U.S. 938, 94 S.Ct. 2654, 41 L.Ed.2d 661 (1974). Plaintiff claims that George Comnas and Philip Piro (two of Tyler's sources for the article) were so untrustworthy that reliance upon their statements was reckless and justified the jury's finding of actual malice.

1. *George Comnas*

George Comnas is a highly experienced Greek shipping executive who was one of the founders of Atlas in 1974. In 1975, he resigned from this position for reasons that are in dispute. As part of his attempt to show that defendants knew Comnas to be an unreliable source, plaintiff cites several alleged inconsistencies between what Comnas told Tyler and what Tyler knew to be the truth from other sources. Even if these inconsistencies existed, they are not sufficient to raise a jury question of actual malice. Simply stated, as a matter of law, reliance upon George Comnas as a primary source does not come close to ap-

proaching the level of recklessness required by the Supreme Court.

In *St. Amant v. Thompson*, the Supreme Court noted that actual malice and reckless disregard are terms that can only be defined on a case by case basis. 390 U.S. at 730-31, 88 S.Ct. at 1325-26. The Court did, however, present certain examples of reportorial behavior that might constitute actual malice:

> Professions of good faith [on the part of the publisher] will be unlikely to prove persuasive, for example, *where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call.* Nor will they be likely to prevail when the publisher's allegations are *so inherently improbable that only a reckless man would have put them in circulation.*

Id. at 732, 88 S.Ct. at 1326 (emphasis supplied). While these hypotheticals of actual malice are certainly not exhaustive, their extreme nature serves to illustrate the enormous burden that a public figure plaintiff must overcome before he can prevail in a case such as this. He cannot merely point to a few inconsistencies in a source's statements and claim that he has proved the existence of actual malice.

In *Washington Post Co. v. Keogh*, 365 F.2d 965 (D.C.Cir.1966), *cert. denied*, 385 U.S. 1011, 87 S.Ct. 708, 17 L.Ed.2d 548 (1967), a New York congressman sued *The Post* for publishing an allegedly libelous article written by a syndicated columnist. Plaintiff claimed that the columnist's reputation for veracity was so poor that the newspaper's reliance upon his word without conducting an

independent investigation of his sources constituted reckless disregard.[10] The Court rejected this argument on the ground that the affidavits presented in support of plaintiff's position merely showed that the columnist "had made erroneous statements on a very few prior occasions" and that he had a controversial reputation.[11] *Id.* at 971.

In this case, much of Comnas' information was independently verified by other sources whose credibility even the plaintiff does not now challenge. Comnas was the former president of Esso Mediterranean and Esso Africa and he obviously had a substantial business career and reputation that could be damaged if he lied. Tyler had discovered many unsolicited laudatory comments made about Comnas by Paul Wolfe (Mobil Executive Vice President), Kousi, and William Tavoulareas himself. In addition, Comnas provided virtually the same information to Tyler as he gave to investigators for the House Subcommittee on Energy and Power.

Plaintiff also claims that defendants should not have relied upon Comnas's statements because they knew that Comnas had left Atlas after being accused of certain improprieties and, therefore, might have a motive to lie about the circumstances surrounding his departure. It is true that Dr. Piro told Tyler that Comnas left the company because he "was caught in some fraud." Kousi told Tyler, however,

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[10] The facts of the instant case are somewhat different from those in *Keogh*. In *Keogh*, the Court was very concerned with the burden that would be imposed on newspapers if they were required to check the sources of all syndicated news reports and columns, 365 F.2d at 972. Because Tyler is a staff reporter for *The Post*, this concern would not appear to be so acute.

[11] The court noted that a publisher would have "reason to suspect a publication's accuracy where he knows or should know that the author or endorser is persistently inaccurate." 365 F.2d at 971.

that he knew of no such accusations and when plaintiff testified before the SEC in 1977, he did not discuss any of these improprieties when setting forth the reasons for Comnas' departure. Kousi and Tavoulareas stated that Comnas left Atlas because he was not handling the business in a satisfactory fashion. Thus, it is not at all clear that Comnas left Atlas under circumstances that should have aroused Tyler's suspicions as to his motivation for speaking unfavorably about the plaintiff.[12]

Even if Comnas harbored some animosity towards Mobil or the Tavoulareases as a result of the circumstances under which he left Atlas, Tyler would not necessarily be precluded from reporting his statements. In *Garrison v. Louisiana,* the Supreme Court emphasized that even if an individual is motivated to speak out of hatred, so long as the statement is honestly believed to be true, he makes a contribution to society's free interchange of ideas. The actual malice test penalizes only the "calculated falsehood." 379 U.S. at 73-75, 85 S.Ct. at 215-216.

2. *Philip Piro*

At the time Sandy Golden introduced Philip Piro to Tyler, Piro was in the midst of a less than amicable divorce proceeding with plaintiff's daughter. He was openly hostile to the Tavoulareas family and undoubtedly harbored a considerable amount of ill will towards them. In addition, Tyler testified that he was very skeptical about Piro's reli-

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[12] Tyler was fully aware of the allegations of Mobil's and/or Samarco's dissatisfaction with Comnas' business prowess. This, however would not appear to reflect poorly on his credibility as a source. As defendants contend, "[a] man's ability to run a business is simply not pertinent to whether 'there are obvious reasons to doubt the veracity' of information he supplies concerning events that he personally witnesses." Defendants' Reply Memorandum at 17.

ability because much of the information he supplied was inaccurate.

The fact that Dr. Piro may have been an unreliable informant is irrelevant, however, because he was not a primary, or even a secondary, source for the November 30 article. He may have been the person who rekindled *The Post's* interest in the Atlas story but, because of Tyler's skepticism, *The Post* relied on other sources as authority for many of Piro's remarks. In addition, Tyler ignored much of the information Piro supplied to him.

C. *Defendants' Disregard of Certain Information Available to Them*

Plaintiff claims that at trial he presented substantial evidence upon which the jury could reasonably find not only that the defendants recklessly disregarded the truth but that they *deliberately* ignored it every time it stood in their path. In support of this contention, he cites certain information that was available to the defendants that they did not include in the November 30 article. Defendants claim that this information is irrelevant to the question of actual malice because they can only be held accountable for the information that they actually printed and not for items that were omitted and which, if included, may have made the article more balanced. Of course, this statement of the law is only partially correct. Obviously, if the defendants possessed information that showed that some of the article was incorrect, ignoring it would constitute actual malice.

The information that plaintiff claims the article should have contained falls far short of proving, however, that the story included knowing lies or reckless untruths. The most that can be said about this information is that its absence caused the article to be "shaded" against Mobil's position.

In submissions subsequent to oral argument, the parties addressed the issue of whether "selective" or "slanted" reporting could constitute actual malice. Plaintiff relied heavily on a case decided by the United States Court of Appeals for the Fifth Circuit, *Rebozo v. Washington Post Co.*, 637 F.2d 375, *cert. denied*, 454 U.S. 964, 102 S.Ct. 504, 70 L.Ed.2d 379 (1981), which appears to hold that actual malice can be proved if the plaintiff shows that the publisher resolved ambiguities in source material in favor of the most potentially damaging alternative. *Id.* at 382.

That holding, however, is arguably inconsistent with the Supreme Court's opinion in *Time, Inc. v. Pape*, 401 U.S. 279, 91 S.Ct. 633, 28 L.Ed.2d 45 (1971).[13] In that case, the United States Commission on Civil Rights prepared a report that discussed some of the allegations contained in a complaint filed against a group of Chicago police officers. *Time* magazine admitted that it knew that the accusations in the summary were merely allegations yet it reported them as findings of the Commission. In reversing the Court of Appeals, the Supreme Court held that the "omission of the word 'alleged' amounted to the adoption of one of a number of possible rational interpretations" of an ambiguous document and this "was not enough to create a jury issue of 'malice' under *New York Times.*" *Id.* at 290, 91 S.Ct. at 639. Thus, the Court found no actual malice despite the fact that certain crucial information was omitted from the article. In the absence of any further guidance on the issue from this Circuit or the Supreme Court, this Court is not

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[13] *See also, Ryan v. Brooks*, 634 F.2d 726, 733 (4th Cir.1980); *Simmons Ford, Inc. v. Consumer's Union*, 516 F.Supp. 742, 749-50 (S.D.N.Y. 1981); *Hutchinson v. Proxmire*, 431 F.Supp. 1311, 1329 (W.D.Wis.1977), *aff'd*, 579 F.2d 1027 (7th Cir.1978), *rev'd on other grounds*, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979).

prepared to consider saving the verdict in this case on the basis of the holding in *Rebozo.*[14]

The issue in this case is, therefore, not whether the article was partisan, narrow or one-sided. The only issue before the Court is whether "the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson,* 390 U.S. at 731, 88 S.Ct. at 1325. As the Supreme Court stated in another context in *Miami Herald Publishing Co.* v. *Tornillo:*

> A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper . . . and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment.

418 U.S. 241, 258, 94 S.Ct. 2831, 2840, 41 L.Ed.2d 730 (1974). Plaintiff supplied the Court with six separate examples of material that the defendants disregarded. Several of these will be addressed below.

Before *The Post* published the article, Tyler interviewed Lewis Lapham, one of Mobil's outside directors. He told Tyler that the Mobil board of directors consistently reviewed the relationship between Mobil and Atlas and that the board was completely satisfied with all aspects of it. He also told Tyler that he did not believe that plaintiff played a personal role in Atlas and that at key board meetings plaintiff would leave the room to facilitate the opportunity for more open discussion of the subject. Plaintiff claims that the jury was entitled to find actual malice because Lapham's

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[14] It should be noted that the November 30 article did contain well over twenty separate paragraphs that set forth Mobil's position on the matter.

quotes were included in an earlier draft of the article but removed from the draft that *The Post* ultimately published.

Despite the fact that the November 30 article did not contain this exact information, it did include at least three paragraphs that conveyed almost everything that Lapham had said. For example, paragraphs 13, 19 and 25 of the article stated that:

> The Mobil board of directors was told from the outset about the Atlas arrangement but was assured that company president Tavoulareas was not involved in his son's venture in any way. . . .
>
> Mobil Chairman Warner says he assured directors in board meetings that Tavoulareas "does not participate in any decisions" relating to Mobil's business with Atlas.
>
> The elder Tavoulareas . . . stated that he divorced himself from Mobil's business with Atlas after his son joined the company.

Thus, the fact that Tyler ignored Lapham's comments may indeed demonstrate that he attempted to understate Mobil's position but it does not show that he acted in reckless disregard of the truth.[15]

Plaintiff also objects that the defendants made no mention whatsoever of the fact that Atlas was an efficient management firm or that Mobil received economic benefits from

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[15] These paragraphs of the article also essentially summarize the contents of two 1974 Mobil memoranda that *The Post* had in its possession. Paul Wolfe, Mobil Executive Vice-President, wrote one of the memos and in it he instructed all Mobil personnel dealing with Samarco to be sure that all business was conducted at "arm's length." Plaintiff wrote the other memo himself, directing Wolfe to bypass him on all Samarco matters in favor of Mobil Chairman Rawleigh Warner.

the relationship. Undisputably, there was much evidence in the record that showed that Mobil profited significantly from this relationship and that Atlas was not merely a fly-by-night organization set up solely for Peter's benefit. These facts, however, are legally immaterial to a finding of actual malice. Presumably, plaintiff would prefer that the article mention the beneficial effects of the arrangement. However, he cannot force *The Post* to include facts that he believes to be important. *See Miami Herald Publishing Co. v. Tornillo,* 418 U.S. at 258, 94 S.Ct. at 2839.

The November 30 article simply did not relate whether the establishment of Atlas was a good or bad business decision. It explicitly stated that Atlas and Samarco were formed in response to Mobil's anticipation of the enactment of Saudi preference shipping laws. It then proceeded to discuss the actions Mobil undertook in response to these fears. If the article had contained a description of Atlas' beneficial economic effects, it may have been more balanced, but the fact that such a description was not included does not mean that the defendants acted with actual malice.

D. *The Language and Innuendo of the Article*

A thorough examination of the plain language of the article, the innuendoes that could reasonably be derived therefrom, and the thrust of the article as a whole reveals that no part of it was published with actual malice as that term is understood in the law of libel. At trial, much of the testimony revolved around the article's first paragraph which stated that plaintiff "set up his son . . . as a partner in a London-based shipping management firm." Even this statement, presumably one of the most offensive in the article, was not published with actual malice. Plaintiff's own 1977 SEC testimony provided Tyler with a sufficient basis for this

allegation. During that testimony, plaintiff stated that he knew in early 1974 that Comnas and his son were seriously discussing the possibility of going into business together. When Samarco became a viable option a few months later, plaintiff testified that he met personally with Comnas in order to recruit him to run the management arm of the business. Tyler also had Comnas' statements that plaintiff had personally recruited him and that plaintiff had requested that Peter be brought into Atlas. In addition, Kousi had referred to Peter's employment as a nepotistic act.

Based on all this information, Tyler wrote that William had " set up" Peter in Atlas. This may not be most felicitous choice of vocabulary that could have been used to describe the situation but, given the material that formed the basis for this statement, it cannot be said that it was a lie or a reckless untruth. Defendants correctly point out that while plaintiff may contest the ultimate truth of some of this information, he does not dispute the fact that Tyler had this material in his possession at the time he wrote the story. Most importantly, as discussed in part III(B) above, he was entitled to rely upon the information his sources provided.

Plaintiff also contends that the article goes far beyond simply stating that he "set up" his son in a lucrative business. Because the implications or innuendoes that the article conveys may also be libelous, the defendants cannot escape liability merely by asserting that the literal language of the article was not published with actual malice. It is up to the Court, however, to decide whether the meaning claimed by the plaintiff can reasonably be inferred from the article's language. Plaintiff cannot add a defamatory meaning to the article by construing it in the most damaging light possible unless there is a basis to support this interpretation. *See* W. Prosser, *Law of Torts* § 111, at 749 (4th ed. 1971);

L. Eldredge, *The Law of Defamation* at 44-45 (1978). In this case, plaintiff reads certain implications into the article's text that, as a matter of law, are unreasonble.

A prime example of this can be found by examining one of the statements made at the December 15, 1982 hearing on these post-trial motions by counsel for plaintiff, Mr. Walsh. He argued that:

> The article said that Tavoulareas was the driving force, that he set the whole thing up, that he conceived this. And certainly a reasonable [sic] could take—it was simply more than just following it up. Right from the headline, Mobil chief sets up son in venture, and through those all important lead paragraphs, the theme was that William Tavoulareas had done this and the [sic] he didn't have any particular business justification . . . .

Judgment n.o.v. Transcript at 78. The article cannot reasonably be interpreted to convey this meaning because it did not say that William Tavoulareas put together the Mobil-Atlas-Samarco arrangement solely for the sake of his son.[16] As mentioned above, the article specifically stated (in paragraphs 40-41) that Samarco and Atlas were created for certain political and economic reasons. The nepotism discussed in the article clearly had its origin in a legitimate business opportunity.

Plaintiff also erroneously contends that the November 30 article impliedly accused him of misusing Mobil's assets, misleading the SEC, and failing to report his activities with

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[16] More specifically, the story does not say that plaintiff "set up" Atlas for his son. Rather, it states that he "set up" his son in Atlas. On its face, this distinction may appear to be minor but, in reality, it is critical to a proper reading of the article.

Atlas to Mobil's shareholders, officers, and directors. This might conceivably be an accurate description of the December 1 article but not of the November 30 story—the one that the jury found the defendants liable for publishing.

In addition, the defendants have attempted to explain and support five particular innuendoes they believe plaintiff contends the article contained.[17] Most of these statements were incorrectly labeled as innuendoes by the defendants because they are explicitly stated in, rather than implied by, the article. Nevertheless, how they are classified is irrelevant because there is no evidence in the record that proves that any of them were published with actual malice. For example, paragraph 21 of the article states that:

> Tavoulareas personally recruited two shipping executives, one an outside consultant and the other a Mobil vice president, for Atlas.

Plaintiff claims that defendants published this statement knowing it was false. The basis for part of this statement, however, is plaintiff's testimony before the SEC in 1977 in which he stated that he recruited George Comnas to head Atlas. In addition, it is undisputed that Mobil made Harmon Hoffmann, the president of Mobil Shipping and Transportation Company, available as an interim manager of Atlas to fill the void created in the company by Comnas' departure. Plaintiff apparently participated to some extent in the discussions that led to Hoffmann's temporary assign-

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[17] The five "innuendoes" defendants identify are that, (1) plaintiff recruited shipping executives for his son's company, (2) plaintiff negotiated the contract between Samarco and Atlas, (3) plaintiff urged that his son be included as a partner in Atlas, (4) plaintiff forced out Comnas to permit Peter to gain control of the company, and (5) plaintiff misled Mobil and the SEC and refused to be interviewed by *The Post*.

ment at Atlas. Tyler also made a note of a conversation he had with Mobil Vice President Everett Checket that confirmed that plaintiff had stated that he had sent Hoffmann to Atlas.[18] These undisputed factors alone negate any possible inference of actual malice.

IV. *Conclusion*

As discussed above, on this motion for judgment n.o.v., the evidence adduced at trial must be construed in the light most favorable to the plaintiff. With this in mind, the Court has thoroughly reviewed the massive record in this case and has concluded that there is no evidence to support the jury's verdict. No matter how the Christine Peterson memorandum is construed, it does not show that anyone responsible for the substance of the article knew that it was false. Even if the Court accepts every inconsistency plaintiff claims existed in George Comnas' statements, reliance upon him by the defendants was not reckless. Similarly, even if the defendants possessed all the information plaintiff contends that they disregarded, a careful examination of this material in the light most favorable to the plaintiff reveals that *none* of it proves that the article contained lies or reckless untruths. In the absence of "actual malice," the judgment rendered against the defendants must be set aside.

> Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive.

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[18] Checket denies that he gave such a statement to Tyler. Tyler may, therefore, have been negligent in transcribing Checket's statement but plaintiff introduced no evidence that would show that Tyler deliberately falsified this document.

New York Times Co. v. Sullivan, 376 U.S. at 278, 84 S.Ct. at 725. An order granting defendants' motions for judgment n.o.v. accompanies this memorandum.

ORDER

Upon consideration of the alternative motions for judgment *non obstante veredicto* (n.o.v.), for a new trial, or for reduction in the amount of the judgment filed by defendants The Washington Post Company, Patrick E. Tyler and Sandy Golden, the memoranda and supplemental memoranda of points and authorities in support thereof and in opposition thereto, the arguments of counsel in open court, the entire record herein, and for the reasons stated in the accompanying memorandum, it is by the Court this 2nd day of May, 1983,

ORDERED that defendants' motions for judgment n.o.v. be, and hereby are, granted; and it is further

ORDERED that the judgment entered in this action on August 3, 1982 in favor of plaintiff William Tavoulareas and against defendants The Washington Post Company, Patrick E. Tyler, and Sandy Golden be, and hereby is, vacated; and it is further

ORDERED that judgment be, and hereby is, entered in favor of defendants The Washington Post Company, Patrick E. Tyler, and Sandy Golden and against plaintiff William Tavoulareas; and it is further

ORDERED that defendants' motions for new trial and for a decrease in the amount of the judgment be, and hereby are, denied without prejudice.

Opinion of the District Court Granting Piro Judgment Notwithstanding the Verdict

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civ. A. Nos. 80-2387, 80-3032

May 19, 1983

WILLIAM P. TAVOULAREAS, et al.,

Plaintiffs,

v.

PHILIP PIRO,

Defendant.

WILLIAM P. TAVOULAREAS, et al.,

Plaintiffs,

v.

THE WASHINGTON POST COMPANY, et al.,

Defendants.

MEMORANDUM-ORDER

The facts and circumstances surrounding this case are more fully discussed in the memorandum opinion issued by this Court on May 2, 1983 in the consolidated case of *Tavoulareas v. The Washington Post Co.*, Civil Action No. 80-3032. In this portion of the case, plaintiffs William and Peter Tavoulareas sued defendant Dr. Philip Piro, Jr.

for slander. Plaintiffs alleged that defendant uttered the following slanderous statements that caused them injury:

> (1) William arranged for Peter's first job with C. M. Lemos & Company;
>
> (2) William set up Peter as a partner in Atlas Maritime Company;
>
> (3) William described his interest at the time as "giving Peter a little nudge to get him along";
>
> (4) After George Comnas left Atlas, William dispatched a senior Mobil shipping executive to help Peter run Atlas; and
>
> (5) Peter illegally took $25,000 to the Bahamas or another foreign country from the United States.

The jury returned a verdict in favor of both plaintiffs, and awarded William $5,000.00 and Peter, $1,000.00 in compensatory damages. Presently before the Court is defendant Piro's motion for judgment notwithstanding the verdict (n.o.v.). For the reasons discussed below, the Court grants defendant's motion as it pertains to William Tavoulareas but denies it as to Peter.[1]

In evaluating the merits of defendant's motion, the Court will apply the same legal standards discussed in the May 2 memorandum concerning the burden that a "public figure" plaintiff bears and the burden that a movant for judgment n.o.v. must satisfy. As discussed in that opinion, at trial William had to overcome the "actual malice" test; that is, he had the burden of proving by clear and convincing evidence that Piro uttered the allegedly dafamatory falsehoods

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[1] It should be noted that the Court does not consider statements (1) and (3) to be defamatory.

either knowing that they were false or in reckless disregard of their truth or falsity. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). Once again, a thorough examination of the record shows that plaintiff did not prove that these statements were said with actual malice.[2] For example, William claims that Piro "fabricated" statement number (2).[3] If this utterance were a fabrication, the actual malice test would have been satisfied. *See St. Amant v. Thompson*, 390 U.S. 727, 732 (1968). Plaintiff alleges that he proved that Piro invented this statement because defendant admitted that he knew very little about the details of the Mobil-Atlas-Samarco arrangement. He was totally unaware of the financing arrangements for the various companies, and had ever heard of Samarco or the Alireza family. This ignorance does not show, however, that defendant knew his statement to be false or that he uttered it in reckless disregard of whether it was true or false. In short, knowledge of the complexities of this business relationship is largely irrelevant to the veracity of the assertion that William set up Peter in Atlas.

Peter Tavoulareas is not a public figure.[4] As a result, he merely had to prove that defendant uttered one of these defamatory statements negligently. Examining the evidence in the light most favorable to the plaintiff, the jury could

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[2] Plaintiff's case against Dr. Piro does, however, present a more difficult question of the existence of actual malice than did his case against The Washington Post Company, Patrick Tyler and Sandy Golden.

[3] Despite defendant's arguments to the contrary, there was sufficient evidence in the record from which the jury could conclude that he uttered the words "set up."

[4] On June 30, 1982, this Court held specifically that Peter Tavoulareas was to be considered a private individual not subject to the *New York Times v. Sullivan* actual malice standard.

find that at least statement number (5) was false and was made negligently by the defendant.[5]

Despite the fact that defendant may never have explicitly stated that Peter *illegally* took money out of the country, the context in which he related the story clearly implied that Ares Emmanuel and he traveled to the Bahamas under suspicious circumstances. In addition, those who heard the statement apparently understood it to be defamatory. At the very least, plaintiff presented sufficient evidence to create a jury question on the issue.

Accordingly, it is by the Court this 19th day of May, 1983,

ORDERED that defendant Piro's motion for judgment n.o.v. as to plaintiff William Tavoulareas be, and hereby is, granted; and it is further

ORDERED that the judgment entered in this action on August 3, 1982 in favor of plaintiff William Tavoulareas and against defendant Piro be, and hereby is, vacated; and it is further

ORDERED that judgment be, and hereby is, entered in favor of defendant Piro and against plaintiff William Tavoulareas; and it is further

ORDERED that defendant Piro's motion for judgment n.o.v. as to plaintiff Peter Tavoulareas be, and hereby is, denied.

/s/ .....
Judge

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[5] This allegedly defamatory statement made no reference whatsoever to plaintiff William Tavoulareas.

Main Opinion of the Three-Judge Panel

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1604

WILLIAM P. TAVOULAREAS, APPELLANT

PETER TAVOULAREAS

v.

PHILIP PIRO

No. 83-1605

WILLIAM P. TAVOULAREAS, APPELLANT

PETER TAVOULAREAS

v.

THE WASHINGTON POST COMPANY,
d/b/a THE WASHINGTON POST,
a Delaware Corporation, et al.

Appeals from the United States District Court
for the District of Columbia
(Civil Action Nos. 80-02387 and 80-03032)

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Argued February 10, 1984

Decided April 9, 1985

John J. Walsh, of the Bar of the Court of Appeals of New York, *pro hac vice* by special leave of the Court, with whom *Joseph A. Artabane* and *Charles Alan Wright* were on the brief, for appellant.

David E. Kendall, with whom *Irving Younger*, *Kevin T. Baine* and *Scott M. Matheson, Jr.* were on the brief, for appellees The Washington Post Company and Patrick E. Tyler.

H. Bartow Farr, III, with whom *Paul M. Smith* was on the brief, for appellee Sandy Golden.

David Machanic for appellee Philip Piro.

Daniel J. Popeo was on the brief for *amicus curiae*, American Legal Foundation, urging reversal.

Before: WRIGHT and SCALIA, *Circuit Judges*, and MACKINNON, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* MACKINNON.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* WRIGHT.

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Panel Majority

MACKINNON, *Senior Circuit Judge*: Plaintiffs William and Peter Tavoulareas brought suit against *The Washington Post* ("*Post*") and several other defendants for libel and against defendant Piro, a source for the story, for slander and its foreseeable republication. The Tavoulareases alleged that they were defamed by articles in the *Post* which stated, among other things, that William Tavoulareas, as President and Chief Executive Officer of Mobil Oil Corporation ("Mobil"), had used his influence to "set up" his son Peter in the shipping business, and then had diverted some of Mobil's shipping business to him. The basic theme of the article was that William Tavoulareas had misused his position and corporate assets to benefit his son. The case was submitted to the jury, which was instructed, in accordance with standards constitutionally required for public figures, that defendants could be held liable only if they published false matter with "actual malice"—*i.e.*, with knowledge of its falsity or reckless disregard of whether it was false or not. The jury returned verdicts for the plaintiffs. The trial judge then ruled on motion that the evidence was insufficient to support such a verdict and entered judgment notwithstanding the verdict ("n.o.v.") for the defendants. *Tavoulareas v. Washington Post Co.*, 567 F. Supp. 651 (D.D.C. 1983). After a careful and independent review of the entire record in the case, we conclude that the evidence adduced by the plaintiffs was sufficient to "establish[] actual malice with convincing clarity," *Bose Corp. v. Consumers Union of United States*, 52 U.S.L.W. 4513, 4521 (U.S. Apr. 30, 1984), and accordingly reverse the grant of the judgments n.o.v. as to the *Post* defendants and defendant Piro, and remand the case to the district court for further proceedings. We affirm the trial court's judgment n.o.v. with respect to defendant Golden because of his lack of responsibility for the publication.

Panel Majority

I. Background Facts

The business relationships that gave rise to this case began in 1974, when Mobil bought a 30 percent interest in the Saudi Arabian Maritime Company ("Samarco"), a joint venture that had been formed a short time before by Fairfield Maxwell Ltd. and members of a powerful Saudi Arabian family, the Alirezas. The Alirezas were the majority shareholders in Samarco. Mobil bought a *minority* interest in Samarco because, at that time, Mobil believed the Saudi government was going to give strong oil shipping preferences to Saudi-owned shippers. Ultimately, however, these preferences were never adopted by the Saudi government.

The Samarco partners agreed to hire an outside firm to manage the ships that Samarco would operate. Mobil suggested Atlas Maritime Company, a new venture being formed by Greek shipping executive George Comnas. Comnas had previously worked for the Greek maritime firm of C. M. Lemos & Co., where Peter Tavoulareas, a 24-year-old graduate of the Master of Business Administration program at Columbia University, *was* also employed as a junior executive. Peter had first approached Lemos in August, 1972 with respect to employment and by January 1, 1973 had started working in the shipping business with C. M. Lemos & Co. (Trial Transcript (Tr.) 2385, 2387, 2451).

Mobil owned a fleet of oil tankers. It wanted some of those ships to be operated under Samarco's name in order to get the expected shipping preference. Mobil agreed to "bareboat charter" its ships (*i.e.*, charter the ships empty and unmanned) to Samarco, which would in turn "time charter" them (*i.e.*, charter the vessels complete with crews and provisions) back to Mobil.[1] Mobil thus

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[1] "[S]ome 12 or 14 other [oil] companies [were] establishing similar organizations . . ." (Tr. 1090). One of defendants' principal witnesses, a former director of the shipping concern

in a sense was "chartering" its own ships to itself and essentially obtaining its crews and provisions through Samarco.[2] In admiralty law "for many, if not most, purposes the bareboat charterer is to be treated as the owner" of the chartered vessel. *Reed v. The Yaka*, 373 U.S. 410, 412 (1963). Thus, the contractual arrangement placed considerable responsibility upon Samarco for Mobil's ships. Samarco, for its part, obtained crews and provisions through its management firm, Atlas.

Comnas, in setting up Atlas, asked two young coworkers at Lemos, Peter Tavoulareas and Ares Emmanuel, to join him as partners. When Peter joined Atlas in August 1974, his father William notified Mobil's Conflict of Interest Committee and formally removed himself from taking part in *decisions* regarding Atlas.[3] The Mobil Committee found no impropriety in the arrange-

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of Fairfield-Maxwell Ltd., John Kousi, stated in his deposition testimony that such circuitous leasing, in contemplation of Saudi preference laws, "was a commonly understood business idea at the time," devised as a means to capitalize on an opportunity to make substantial profits by using surplus tankers laid up by the world-wide depression in oil (Tr. 3220-22, 3263, 3167), and that Atlas could operate ships at less cost than Mobil (Tr. 3246).

[2] Mobil stated that it wanted an independent shipping operation to avoid a conflict of interest between the shipping interests of Mobil and those of Fairfield-Maxwell Ltd. (Tr. 3126).

[3] In January, 1974, William Tavoulareas notified Mr. Warner, Chairman of Mobil's Board of Directors, that "there was a chance of [his son Peter] participating in some kind of a venture with George Comnas" (Tr. 4135). Shortly thereafter, the transaction was disclosed to George Birrell, Chairman of Mobil's Conflict of Interest Committee (Tr. 1515-18). Atlas was organized in July, 1974 (Tr. 4427). Peter joined Atlas in August 1974 (Tr. 1521, 1958). On August 2, 1974, William Tavoulareas wrote a letter stating, "I will not make decisions" (Tr. 4136). And on the same date Mr. Wolfe wrote a letter "notifying the people in the [Mobil] organization on a need to know basis of Peter's participation" (Tr. 4136).

ment, which was fully disclosed to the Mobil Board of Directors.

Comnas was forced out of Atlas a year later, in 1975, ostensibly because of self-dealing, fraudulent practices, and dissatisfaction with his performance on the part of Mobil and the Saudis. He was placed on Mobil's payroll as a consultant, and Atlas reimbursed Mobil for his salary. Mobil sent Harmon Hoffmann,[4] a Mobil shipping executive, to act as interim head of Atlas. *Hoffmann was offered Comnas' share of Atlas stock* (Tr. 4151), but turned down the offer to become an equity partner, and after six months returned to Mobil. Peter Tavoulareas and Emmanuel then assumed the management duties of Atlas. Atlas prospered during the succeeding years; by 1979 it apparently was operating 17 ships, including 7 for Samarco, only 4 of which were Mobil's.

The Mobil-Samarco-Atlas relationship—and specifically the Tavoulareas-Atlas connection—was explained to Mobil shareholders in a 1976 letter. At about the same time, a party or parties sent anonymous letters to a number of newspapers, alleging that the arrangement violated the federal securities laws. One of those letters went to reporter Robert Woodward of the *Post*. Woodward, along with reporters for several other newspapers, investigated the anonymous charges; but none of them apparently found any wrongdoing, and no stories were published. The Securities and Exchange Commission, which obtained a copy of one of the letters, launched an informal investigation and called upon William Tavoulareas to testify in non-public proceedings. The SEC found no impropriety.

Evidence presented by the plaintiffs showed that Mobil did *not* exert control over Samarco, in which it

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[4] Hoffmann's name was reported as Herman Hoffmann in the *Post's* November 30 article.

was a minority shareholder, and that all of the decisions relating to Atlas were approved by the controlling Saudi partners. The arrangement was fully disclosed to Mobil's Conflicts of Interest Committee, Mobil's Board of Directors, and to the company's shareholders. Evidence indicated that Mobil and its shareholders had derived economic benefits from the Samarco-Atlas arrangement because Atlas operated the Mobil ships more cheaply than could Mobil.

The article at issue in this case had its genesis five years after the creation of Atlas and three years after disclosure to the shareholders. In October, 1979, Samuel "Sandy" Golden, a reporter for *The Montgomery* [Maryland] *Journal*, met Philip Piro, a physician who was married to William Tavoulareas' daughter. Piro was in the midst of a less than amicable divorce proceeding. Piro told Golden about the Atlas transactions. Golden testified that Piro told him that Mobil Oil president William Tavoulareas had set up his son Peter in the business, and that it had made Peter an "overnight millionaire" (Tr. 166). Piro mentioned that Woodward had previously investigated the story.

Golden, who had been angling for a job at the *Post* for some time, sensed a story. He unsuccessfully called Woodward several times and finally left a message that he "had a story about the president of Mobil setting up his son to become an overnight millionaire" (Joint Appendix (J.A.) 786). Woodward, by then an editor at the *Post*, assigned reporter Patrick Tyler to return Golden's call. Tyler called Golden. Golden told Tyler that he had a hot source for the Tavoulareas story. Tyler agreed that if Golden's source led to a big story they would share a *Post* byline. The two reporters met at The Owl restaurant in Baltimore, where they jointly interviewed Piro. Tyler apparently was pleased with Piro's evidence; on

leaving the restaurant he remarked that it's "not every day you knock off one of the seven sisters." [5]

At this point, the two reporters began following separate trails. Golden concentrated on getting more information from Piro and conducted several telephone interviews with him. Although Golden repeatedly assured Piro that he was not recording them, he taped several of the conversations. Golden also began seeking "possible enemies" of Tavoulareas, *i.e.*, those with a "motive for revenge" and "with a reason to say bad things about Mr. Tavoulareas" (J.A. 815). In his search, he met Peter Stockton, an investigator for Rep. John Dingell, Chairman of the House of Representatives Subcommittee on Energy and Power. Stockton moonlighted as an employee of CBS' "60 Minutes" television show. Golden believed that Stockton, who had something of a reputation as a crusader, "hate[d] people with money." Golden played the Piro tapes for Stockton, who at some point relayed Golden's information to Congressman Dingell. Stockton later contacted Tyler and passed other information to him. Dingell wrote to the SEC seeking an investigation.

Tyler, meanwhile, tracked down Comnas and met with him in New York. Comnas, who initially requested anonymity, allegedly told Tyler about the Atlas arrangements. The *Post* contends that Comnas was the major source for its stories. (Since Comnas did not testify at trial and Tyler is a reporter who does not use tape recorders, only Tyler's own account of the conversations is available.) Tyler also talked to John Kousi, an executive of Fairfield Maxwell, Ltd., one of the Samarco partners. Parts of Kousi's deposition were placed into evidence.

Tyler also tried to interview William Tavoulareas and other Mobil executives, but generally was rebuffed. Witnesses for the plaintiffs stated that they were wary of

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[5] "Seven Sisters" is a colloquial term for the seven largest oil companies, one of which is Mobil.

talking with Tyler because in an earlier story on the oil shortage he had misrepresented statements made by Mobil executives. Tavoulareas, however, agreed to give written answers to questions that Tyler would submit in writing, which was done.

Tyler wrote the story, and the *Post* submitted it to its editing process. During editing, several pieces of material were deleted that were favorable to Mobil and Tavoulareas, chiefly opinions of various persons in and out of Mobil (1) that the Atlas arrangement had benefitted the company, and (2) that William Tavoulareas had not been directly involved in Atlas. The *Post* copy editor assigned to the story, Christine Peterson, read it, considered its implications, and wrote a memorandum to other editors that she found it "impossible to believe" that William Tavoulareas had arranged the Atlas affair in order to benefit his son. Tyler responded with a memo in which he acknowledged that "a good editor might say that part of our case against Tavoulareas seems tenuous," and noted that a couple of "key points" were based on a single source—presumably Comnas. The *Post* editors did not alter the story in response to Peterson's memo, and the story, after clearance from the lawyers, was published.

When the article appeared, Tyler was given sole byline credit for it, but Golden received designation as a "Special Correspondent" who had "contributed" to the story.

The first article—which is reprinted as an Appendix to this opinion—appeared on November 30, 1979.[6] It bore the headline "Mobil Chief Sets Up Son in Venture," and its essential theme is made clear from its beginning:

> Mobil Oil Corp. president William P. Tavoulareas set up his son five years ago as a partner in a London-based shipping management firm that has since done millions of dollars in business operating Mobil-owned ships under exclusive, no-bid contracts.

Panel Majority

The article detailed the transactions that led to the creation of Samarco and Atlas. Although the article contained a great deal of innuendo,[7] the defamatory picture it conveyed is based upon certain factual allegations contained therein. Specifically, it alleged:

1. William Tavoulareas "set up his son . . . as a partner" in Atlas, a company to which William and Mobil would divert a great deal of business.

2. "As the formation of Atlas was being planned in April 1974, [William] Tavoulareas personally urged [Comnas] that his son be included as an equity partner in Atlas."

3. Although he had told the Mobil board that he recognized the potential conflict of interest and would not personally be involved in dealings with Atlas, it was nevertheless "the elder Tavoulareas [who] dispatched one of his senior shipping executives, Herman F. Hoffmann, [*sic*] to London to help run Atlas" after Comnas left the firm.

The core allegations—baldly stated as facts in the article—were that William Tavoulareas set up Peter in Atlas and then dispatched a Mobil employee and used Mobil resources to bail out Atlas when Comnas was forced out. Without these "facts," the story would be nothing more than a report that Mobil had business dealings with a small company in which its president's son had a part interest—hardly page 1 material.

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[7] *E.g.*, the statement in ¶ 31 of the article that "the Mobil president's son was graduated from St. Johns University in New York, where his father sits on the board of trustees," and the following parenthetical aside in ¶ 68, immediately succeeding quotation of Mobil's statement that "the overriding selection criteria for [ship management] operations is the prospect of good, safe performance": "(Atlas has lost one ship . . . which exploded and burned last May . . . . The ship was sold for scrap in July.)."

These core "facts" formed the foundation on which the implications of the article rested. In a memo to his superiors at the *Post* (J.A. 2488-91), Tyler characterized the story as dealing with the "incredibly fancy corporate footwork" undertaken by Tavoulareas and Mobil to (1) "ingratiate itself with the Saudis," and (2) "set up the son of Mobil's president in a shipping business when business was bad and the business, therefore, stood little chance of prospering without Mobil's help." In the memo, he called it a "stor[y] of nepotism, reward without merit and favoritism by those who wield vast amounts of power." He continued:

> . . . Mobil—which originally turned down a chance to join Samarco—changed its mind after it dawned on Mobil's president that such a partnership would justify creation of a small management firm at a time when Tavoulareas' son was aspiring to such a career and was already at work with one of the Greek shippers.

The story showed, wrote Tyler, "that Mobil's decisions in this case were not made for the traditional business reasons, or for the reasons stated by Mobil." In specific response to Peterson's assertion that it was "impossible to believe that Tavoulareas alone could put together [the Samarco-Atlas] scheme for the sake of his son's business career, or that he would want to," he wrote:

> Samarco can be seen as nothing more complicated than a slight diversion from Mobil in the way it moved its crude oil from point A to point B.
>
> The question of "why" Mobil's president would want to orchestrate such a diversion when it would benefit his son's business career is begging things a little.

Tyler's interpretation of the article's implications was echoed by Peterson, who apparently read the story to suggest that "Tavoulareas alone . . . put together [the Atlas-Samarco] scheme for the sake of his son's business career." As a whole, she wrote, the story was about the

use of $680,000-a-year of Mobil's assets as a "plaything for an indulged son."

The interpretations of Tyler and Peterson reflect fairly accurately the defamatory implications that an average reader would draw from the story: (1) that William Tavoulareas, using his position as a principal officer of Mobil, "set up" his son in Atlas; (2) that a primary motive for Mobil's participation in the Atlas deal was to benefit Peter Tavoulareas;[8] (3) that William Tavoulareas, although claiming to have isolated himself from business dealings with Atlas, nevertheless directly participated in important matters and personally channelled a Mobil employee and resources to help Atlas; and (4) that Tavoulareas and Mobil may have violated the securities laws by failing to disclose Peter's involvement in Atlas.[9] Ultimately, the basic implication was that Tavoulareas improperly used his position and the resources of Mobil to benefit his undistinguished 24-year-old son. All of these defamatory implications are based on the statements of "fact" identified above.

After the first publication, William Tavoulareas denied the story and demanded a retraction. The *Post* has steadfastly refused to retract it and presently asserts that the "story was in fact true." Brief of Post at 18. Other publications picked up the story, which enjoyed a brief flurry in the press. It does not appear, however, that either the Mobil shareholders or the Securities and

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[8] *See* discussion at pp. 79-80 *infra*.

[9] The district court's charge to the jury similarly instructed that William Tavoulareas' complaint contended that the articles reasonably implied:

> That he breached his fiduciary duties to Mobil. That he wasted and misused assets of Mobil. That he wrongfully diverted such assets to Peter Tavoulareas for his benefit, and four, that he committed criminal acts.

(Tr. 4550).

Exchange Commission *ever* found any impropriety in the transactions at issue.

William and Peter Tavoulareas brought two actions: one for libel against The Washington Post Company [10] and several individuals (collectively, the "*Post* defendants"), including Tyler, Golden, and Woodward (No. 83-1605),[11] and one for slander and its foreseeable republication against Piro (No. 83-1604). The two actions were consolidated. After trial, the jury returned verdicts in which they awarded damages that indicated they necessarily determined that:

1. In the November 30 article the *Post* defendants defamed William Tavoulareas. The premise of the article was false and was published with knowledge or reckless disregard of its falsity. The jury awarded Tavoulareas $250,000 in compensatory damages and $1,800,000 in punitive damages against the *Post* defendants.

2. The *Post* defendants did *not* defame Peter Tavoulareas.

3. Piro defamed both William and Peter Tavoulareas. The jury awarded compensatory damages of $5,000 to William and $1,000 to Peter.

After receipt of the verdicts, the district court granted judgments n.o.v. for Piro and for the *Post* defendants against William Tavoulareas. The trial court found that Tavoulareas was a public figure and that there was no proof that the defendants had acted with actual malice:

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[10] The Washington Post Co. is a large multimedia corporation which has substantial broadcast holdings and which publishes magazines and newspapers, including the *Post*.

[11] Also named in the complaint was *Post* president Katharine Graham, but the district court dismissed the case against her, and the plaintiffs do not contest this. Accordingly, she is not a party to this appeal.

> The article in question falls far short of being a model of fair, unbiased, investigative journalism. There is no evidence in the record, however, to show that it contained knowing lies or statements made in reckless disregard of the truth.

567 F. Supp. at 654. The district court affirmed the jury verdict in favor of Peter Tavoulareas against Piro.

On appeal, the parties have argued two issues. First, whether William Tavoulareas is a public figure, requiring application of the actual malice standard of *New York Times v. Sullivan*, 376 U.S. 254 (1964)? And second, whether there is sufficient evidence in the record to support a finding of actual malice? On review, we consider the second of these issues and, in addition, inquire whether the charge that William Tavoulareas "set up" his son in the manner alleged, and certain implications reasonably flowing from the specifically pleaded defamatory allegations, were defamatory and false. Because we find, after review of the whole record, that the evidence was sufficient to demonstrate "clearly and convincingly" that the article was defamatory and false and that the defendants acted with actual malice—and hence to meet the *New York Times* standard—we do not reach the issue whether Tavoulareas was a "public figure." [12]

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[12] We note, however, that the public figure determination in this case would not be free from difficulty. The Supreme Court has defined two classes of public figures. "General public figures" are those who are always, for every purpose, to be considered public figures; the class is small and specifically limited to those who have "general fame or notoriety in the community." Gertz v. Robert Welch, Inc., 418 U.S. 323, 351-52 (1974). The district court rejected the suggestion that William Tavoluareas was an all-purpose public figure; in the absence of any evidence that William Tavoulareas was a household word prior to the *Post's* accusations, that determination appears correct. More common than general public figures, however, are "limited public figures," *i.e.*, those who are public figures only with regard to certain issues. They are those who have "thrust themselves to the forefront of *partic-*

II. The Legal Standard

The constitutional standard of liability for public figures, as established by the Supreme Court in *New York Times* and restated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), is well settled. A public figure cannot recover for defamatory falsehoods, no matter how damaging and how utterly baseless, unless he can show "actual malice"—*i.e.*, establish by *"clear and convincing proof* that the defamatory falsehood was made with *knowledge of its falsity or with reckless disregard for the truth."* *Gertz*, 418 U.S. at 342 (emphasis added). The Court consistently has refused to apply objective stand-

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ular public controversies in order to influence the resolution of the issues involved." *Id.* at 345 (emphasis added). The district court found that William Tavoulareas was a limited public figure.

The framework for analyzing limited public figures was set forth by this court in Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980). The court must (1) define the precise controversy involved, (2) analyze the plaintiff's role in the controversy, and (3) determine if the defamatory material was germane to the plaintiff's participation in the controversy. *Id.* at 1296-98. The difficulty in this case is finding any "particular public controversy" regarding the Mobil-Atlas-Samarco arrangement *which existed before Tyler's story was published.* A defendant obviously cannot create a controversy by publishing defamatory falsehoods and then escape liability by pointing to the resulting furor as evidence of a public controversy. The *Post* in its brief has proffered several "controversies" to which its article might be "germane," but without deciding the issue we note that on this record these are either virtually nonexistent (*e.g.*, the alleged "pre-existing public controversy" over the Mobil-Samarco-Atlas arrangements) or apparently unrelated to the subject of nepotism within Mobil (*e.g.*, the "debate" between energy conservationists and those favoring increasing oil imports, or the alleged public controversy over Mobil continuing to obtain oil from Saudi Arabia). Our disposition of the case, however, makes it unnecessary to reach these issues.

ards to determining actual malice; no matter how unreasonable the defamatory statement, the defendant cannot be held accountable unless he "in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). At issue, then, is the *state of mind* of the defendants.[18]

Proof of mental state very often "depends . . . on the credibility of the witnesses, which can best be determined by the trier of facts after observation of the demeanor of the witnesses during direct and cross-examination." *Morrison v. Nissan Motor Co.*, 601 F.2d 139, 141 (4th Cir. 1979) (cases cited); *accord, Mutual Fund Investors, Inc. v. Putnam Management Co.*, 553 F.2d 620, 624 (9th Cir. 1977). Thus, in the ordinary case, federal courts are reluctant to decide state of mind issues in summary fashion. *See, e.g., Morrison*, 601 F.2d at 141. It is not that summary disposition is disfavored when the issue is the mental state of the defendant; rather, the very nature of the inquiry is frequently so bound up with the weighing of credibility that courts, as a practical matter, will only infrequently find the facts regarding mental state so crystal-clear that a reasonable jury could reach only one conclusion.

A few courts have argued that the public interest in fostering free debate requires that summary disposition be used especially freely in defamation cases—that it should, in fact, be the "rule," rather than the "exception." *See, e.g., Oliver v. Village Voice, Inc.*, 417 F. Supp. 235, 237 (S.D.N.Y. 1976); *Guitar v. Westinghouse*

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[18] The Washington Post Co. is being sued in its corporate capacity. As a corporation, it acts only through its employees or other agents. These employees include in this case not only reporter Tyler, but all those responsible for the November 30 article. It is the state of mind of these persons that connects liability to the Post. We note that the jury was properly instructed in this regard (Tr. 4559).

Electric Corp., 396 F. Supp. 1042, 1053 (S.D.N.Y.), *aff'd*, 538 F.2d 309 (2d Cir. 1976). Summary judgment, in particular, is said to be necessary because the suit itself, not merely the unfavorable verdict, could "chill" protected speech: Due to the possibly overwhelming expense of even a successfully defended defamation action, the threat of litigation itself may cause potential defendants to steer far wider of the unlawful zone and act as self-censors. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)) ("[Critics] tend to make only statements which 'steer far wider of the unlawful zone.'"). The theory is that frivolous suits should be ended quickly by summary proceedings. By analogy, it could be argued that "[t]he policies governing the propriety of summary judgment presumably apply to motions for directed verdict and for judgment n.o.v." R. Sack, Libel, Slander, and Related Problems 557 (1980). But that is not the case. Whatever value *summary judgment* has in sparing defamation defendants the expense of actually going to trial, there is no such value in *judgments n.o.v.*, for they come into being *after* the trial is over and virtually all of the expense has been incurred. Strictly in terms of court costs and legal fees, the "chill" is the same whether judgment after trial is based on a jury verdict or a judgment n.o.v.

In any event, the general proposition that summary proceedings are favored in defamation law has been seriously undercut by recent Supreme Court pronouncements. The Court, recognizing the critical role credibility frequently plays in assessing mental state, has acknowledged that "proof of 'actual malice' . . . does not readily lend itself to summary disposition," and expressed "some doubt" that summary judgment should be considered the "rule" rather than the "exception" in defamation cases. *Hutchinson v. Proxmire*, 443 U.S. 111, & 120 n.9 (1979); *see also Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563,

1570 (D.C. Cir. 1984). In the recent case of *Calder v. Jones*, 52 U.S.L.W. 4349, 4351 (U.S. Mar. 20, 1984), the unanimous Court remarked:

> [T]he potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits. . . . We have already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws.

The *Calder* Court cited *Hutchinson* for the proposition that "no special rules apply for summary judgment" in defamation cases. *Id.*

Under Fed. R. Civ. P. 50(b), a motion for judgment n.o.v. is essentially a motion for directed verdict made *after* the jury has returned its verdict. Consequently, "the standard for awarding a judgment n.o.v. is the same as that applied when ruling on a motion for a directed verdict." *Vander Zee v. Karabatsos*, 589 F.2d 723, 726 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 962 (1979); *see Lester v. Dunn*, 475 F.2d 983, 985 (D.C. Cir. 1973); 5A Moore's Federal Practice ¶ 50.07[2] (2d ed. 1982). The standard usually applied was elaborated by this court in *Alden v. Providence Hospital*, 382 F.2d 163, 165 (D.C. Cir. 1967):

> Unless the evidence, *along with all inferences reasonably to be drawn therefrom, when viewed in the light most favorable to the plaintiff* is such that reasonable jurors in fair and impartial exercise of their judgment could not reasonably disagree in finding for the defendant, the motion must be denied.

Accord, Vander Zee, supra, 589 F.2d at 726 (emphasis added) (footnote omitted). The Ninth Circuit aptly summed up the application of these rules in a defamation action:

> [I]n a libel case, as in other cases, the party against whom . . . a motion for a judgment notwithstanding the verdict is made is entitled to have the evidence viewed in the light most favorable to him and to all inferences that can properly be drawn in his favor by the trier of fact. We think, too, that in such cases it is not only not the duty of the judge, or this court of appeal, to weigh the credibility of the evidence, or to draw inferences in favor of the moving party (except, of course, when no contrary inference can legitimately be drawn) but that *neither the judge nor this court on appeal has the authority to weigh credibility or to choose among legitimate inferences in such cases* [emphasis added].[14]

The *standard* against which the evidence must be examined is that of *New York Times* and its progeny. But the *manner* in which the evidence is to be examined in the light of that standard is the same as in all other cases in which it is claimed that a case should not go to the jury. If the evidence, so considered, measures up to the *New York Times* standard, the case is one for the jury, and it is error to grant a directed verdict . . . .

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[14] Even though the trial judge may form opinions about the credibility of witnesses during the course of a jury trial, credibility cannot be a factor in granting a motion for judgment n.o.v. Morelock v. NCR Corp., 586 F.2d 1096, 1104 (6th Cir. 1978) ("the trial court may neither weigh the evidence, pass on the credibility of witnesses nor substitute its judgment for that of the jury"), *cert. denied*, 441 U.S. 906 (1979); 5A J. Moore, Moore's Federal Practice ¶ 50.07[2] (2d ed. 1984) ("the motion for judgment n.o.v. may be granted only when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment"). A judgment n.o.v. is particularly inappropriate where the case depends on witness credibility. *Cf.* Polehmus v. Water Island, Inc., 252 F.2d 924, 928 (3d Cir. 1958). On review, an appellate court need not defer to any credibility findings used by the trial judge to support a grant of judgment n.o.v., but any such credibility findings could indeed be grounds for reversal.

Guam Federation of Teachers, Local 1581 v. Ysrael, 492 F.2d 438, 441 (9th Cir.), *cert. denied*, 419 U.S. 872 (1974). As the Ninth Circuit held in *Alioto v. Cowles Communications, Inc.*, 519 F.2d 777, 780 (9th Cir.), *cert. denied*, 423 U.S. 930 (1975):

> A district judge on motion for judgment n.o.v., or an appellate judge on review, must examine the evidence to see whether, if all permissible inferences were drawn in the plaintiff's favor and all questions of credibility were resolved in his behalf, the evidence would then demonstrate by clear and convincing proof that the libelous material was published with actual malice.

See also Yiamouyiannis v. Consumers Union of the United States, Inc., 619 F.2d 932, 940 (2d Cir.) ("[d]efamation actions are, for procedural purposes, such as . . . summary judgment, to be treated no differently from other actions"), *cert. denied*, 449 U.S. 839 (1980); *Maheu v. Hughes Tool Co.*, 569 F.2d 459, 464 (9th Cir. 1977) ("traditional standard for appellate review of motions for a directed verdict and judgment n.o.v. should be applied in [a defamation] case"); *Time, Inc. v. Ragano*, 427 F.2d 219, 221 (5th Cir. 1970) ("all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion for summary judgment"); *Vandenburg v. Newsweek, Inc.*, 441 F.2d 378, 379 (5th Cir.) (same), *cert. denied*, 404 U.S. 864 (1971).

The district court correctly stated this legal standard, 567 F. Supp. at 652-53, and *even the defendants concede that "the evidence must be construed most favorably to William Tavoulareas."* Brief of *Post* at 29-30. The question thus is whether the evidence and the reasonable inferences derived from it, when examined in the light most favorable to the plaintiffs, establishes by *clear and convincing evidence* that the defendants acted with knowledge that the charge was false or with reckless disregard of its truth or falsity.

But a court evaluating a defamation verdict which significantly involves First Amendment considerations must be far less deferential to the verdict of the jury. The Supreme Court held in *New York Times v. Sullivan* that in public figure defamation cases courts "must 'make an *independent examination of the whole record,*' . . . so as to assure [themselves] that the judgment does not constitute a forbidden intrusion on the field of free expression." 376 U.S. at 285 (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (emphasis added). This principle has been consistently followed by the Court in subsequent cases. *See, e.g., St. Amant v. Thompson*, 390 U.S. 727, 732-33 (1968); *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 11 (1970). The rule has been recognized and followed by the courts of appeals. *See Guam Federation, supra*, 492 F.2d at 442 (recognizing duty to "make an independent evaluation of the whole record") (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963)); *Alioto*, 519 F.2d at 780 (court must examine record and evaluate evidence itself on issue of actual malice).

The Supreme Court recently reaffirmed that rule in *Bose Corp. v. Consumers Union of United States*, 52 U.S.L.W. 4513 (U.S. Apr. 30, 1984). The court held:

> The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, *must independently decide whether the evidence in the record is sufficient* to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."

Id. at 4520 (emphasis added). This is the standard that controls our review of the record in this case.

The issue *Bose* presents in the present context is whether we are to apply our independent judgment to

each separate fact determination that forms the basis for the ultimate conclusion of "actual malice," or rather only to the ultimate conclusion of clear and convincing proof of "actual malice." For a number of reasons, we think the latter is the case.

First, the Court's expression of its holding in *Bose* is phrased only in terms of the ultimate issue; and certiorari had been granted only "to consider whether the Court of Appeals erred when it refused to apply the clearly erroneous standard of Rule 52(a) to the District Court's 'finding' of actual malice." *Id.* at 4515. Admittedly, independent review of the ultimate issue, of course, could be thought to subsume independent review of the preliminary factual issues on which it is based. But as detailed below, the Supreme Court discussed extensively the distinction between purely factual findings and so-called ultimate facts to repel such a conclusion.

Second, the court of appeals decision affirmed in *Bose* had *not* questioned the factfinder's preliminary factual determinations. The issue under review was whether it could properly be found defamatory, under an "actual malice" standard, for the defendant to print that the loudspeakers manufactured by the plaintiff caused musical instruments to sound as though they were wandering "about the room." [15] As the Supreme Court noted, the

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[15] The Supreme Court noted:

> The factual portion of the District Court's opinion may fairly be read as including the following findings: (1) Seligson's [the defendant's engineer's] actual perception of the apparent movement of the sound source at the time the [speaker] was tested was "along the wall" rather than "about the room"; (2) . . . neither the "average reader," nor any other intelligent person, would interpret the word "about" to mean "across"; (3) Seligson is an intelligent, well educated person; (4) the words "about the room" have the same meaning for Seligson as they do for the populace in general; and (5) although he was otherwise a credible witness, Seligson's testimony that

court of appeals had accepted all the district court's factual findings, observing "that it 'was in no position to consider the credibility of witnesses and must leave such questions of demeanor to the trier of fact.'" *Id.* at 4515 (quoting 692 F.2d at 195). The Supreme Court noted with approval this refusal of the court of appeals to second-guess credibility findings of the factfinder. *Id.* at 4517.[16] The Court likewise did not question them:

> We may accept all of the purely factual findings of the District Court and nevertheless hold as a matter of law that the record does not contain clear and convincing evidence that Seligson or his employer prepared the loudspeaker article with knowledge that it contained a false statement, or with reckless disregard of the truth.

Id. at 4521. What both the court of appeals and the Supreme Court held was that *in the reviewing court's own judgment*, these accepted preliminary facts did not support *the ultimate conclusion* of clear and convincing proof of actual malice.

It is entirely clear, then, that *Bose* does not *hold* that any factual determination other than the ultimate con-

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(a) he did not "know what made me pick that particular choice of words" and (b) that the word "about" meant what he had drawn on the board, is not credible.

Id. at 4520.

[16] The Court recently reaffirmed this point in Patton v. Yount, 52 U.S.L.W. 4896, 4900 (U.S. June 26, 1984), where it noted that where the determination is one of credibility, it is largely one of demeanor. The Court acknowledged, "[a]s we have said on numerous occasions, the trial court's resolution of such questions is entitled, even on direct appeal, to 'special deference,'" citing *Bose*. *Id.* This court has implicitly recognized this principle in Lebron v. Washington Metro. Area Transit Auth., 749 F.2d 893, 897 (D.C. Cir. 1984). Even the dissent confesses that the "[c]redibility of a witness may be the most compelling case for deferring to the factfinder." Dissent at 13. The fact finder here was the jury.

clusion may be independently reviewed. The only question is whether it *suggests* so. One indication that it does not is the following statement in the opinion:

> Rule 52(a) commands that "due regard" shall be given to the trial judge's opportunity to observe the demeanor of the witnesses; the constitutionally-based rule of independent review permits this opportunity to be given its due.

Id. at 4517. Unless one attributes to this statement the unthinkable obfuscation that "permitting the opportunity to be given its due" includes ignoring the factfinder's credibility determination and making an independent judgment, this must mean that *de novo* review does not apply to those preliminary factual determinations based on credibility. Since this typically includes most preliminary factual determinations, there would be little sense in preserving the "independent judgment" rule for the remainder.[17]

That *Bose* addresses only the ultimate question of actual malice is shown, thirdly, by its reliance upon the distinction between questions of fact (which are governed by Rule 52(a)) and questions of law (which are for the court). "At some point," the Court says, "the reasoning by which a fact is 'found' crosses the line between application of those ordinary principles of logic

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[17] It would not be valid to argue that the obfuscatory reading must be adopted or else the factfinder's credibility-based determination *on even the ultimate issue itself* would have to be accepted, thus destroying the core holding of the case. It is possible for a credibility determination to conclude the ultimate issue *for* the defendant (which would not of course trigger any requirement of independent review) but not *against* him. Only the defendant can testify of his own knowledge as to his state of mind. Thus, the jury may choose to believe the defendant's assertion that he did not know the falsity of the statement; it would not be permitted to consider the conclusory statement of someone else that he did.

and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment." *Id.* at 4518 n.17. And again: "When the standard governing the decision of a particular case is provided by the Constitution, this Court's role in *marking out the limits of the standard* through the process of case-by-case adjudication is of special importance." *Id.* at 4518 (emphasis added). Such descriptions, and such reliance upon the law-fact distinction, makes sense as applied to the ultimate issue of whether, given certain facts, the constitutional standard of "actual malice" has been met. The Court's statements in *Bose* would make little sense if applied to such preliminary issues as whether the reporter was told thus-and-so by a particular source.

In sum, if the Court's statement in *Bose* that "First Amendment questions of 'constitutional fact' compel this Court's *de novo* review," *id.* at 4519 n.27, is not limited to the *ultimate constitutional fact* (*e.g.*, whether the writing was "obscene," whether there was a "clear and present danger," or, in the context of the present case, whether there was "actual malice"), then we see no rational stopping point short of holding that all factual issues in a First Amendment case are for the court. To embrace that kind of *de novo* review, as advocated by the dissent, would eviscerate the role of the jury and, in effect, vest appellate courts with original jurisdiction in libel actions. There is no indication that *Bose* was meant to set forth such a sweeping proposition. Indeed, its frequent references to the continuing applicability of Rule 52(a) would be incomprehensible on that basis.

This searching review of the evidence is fully harmonious with the established rule that in evaluating such evidence, all reasonable inferences must be granted to the plaintiff. The *Guam Federation-Alioto* line of cases

correctly applied the *New York Times* requirement of review of the entire record, and nothing in *Bose* indicates that they are no longer good law.[18] Moreover, neither *New York Times* nor *Bose* suggests that a district court or a court of appeals is to substitute its assessment of credibility or its general appraisal of the evidence for that of the jury. Courts reviewing the determinations of a factfinder—be it judge or jury—are not to examine the evidence of the plaintiffs and that of the defendants and decide which to believe. That is the function of the factfinder. Rather, they must carefully examine the evidence, draw all reasonable inferences in favor of the verdict of the jury, and then determine whether that evidence demonstrates clearly and convincingly that the defendant acted with actual malice.[19]

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[18] As the dissent notes, *see* Dissent at 6, 11, the Supreme Court in *Bose* stated that judges must make "an independent assessment . . . of the evidence germane to the actual malice determination." *Bose*, 52 U.S.L.W. at 4521 n.31. But the Court was not announcing some novel rule. It noted expressly that the rule in *Bose*, which originally was used for defamation cases in *New York Times v. Sullivan*, had been applied "uncounted times before." *Bose*, 52 U.S.L.W. at 4521. The *Guam Federation-Alioto* line of cases was decided in light of this standard. *See Guam Federation, supra* 492 F.2d at 442; *Alioto*, 519 F.2d at 780. The *Bose* court did not even mention these cases, much less cast any doubt upon their continued vitality. Absent some clear signal from the Court, we are reluctant to read *Bose* as overruling, *sub silentio*, such a well-reasoned and well-established line of authority.

[19] We make it clear that in no way will jury verdicts in libel cases be protected by indulging in unreasonable inferences on appeal. No set of inferences could transfigure an otherwise inadequate factual record into a clear and convincing finding of actual malice. The inferences drawn must be reasonable. Schneider v. Chrysler Motors Corp., 401 F.2d 549, 555 (8th Cir. 1968) ("plaintiff . . . is not entitled to the benefit of unreasonable inferences, or inferences at war with undisputed facts").

Moreover, as our discussion indicates, in performing our constitutionally prescribed function we conduct our own inde-

Panel Majority

With the Supreme Court's admonitions in mind, and cognizant of our duty to "exercise [our] independent judgment and determine whether the record establishes actual malice with convincing clarity," *Bose*, 52 U.S.L.W. at 4521, we turn to the required extended examination of the evidence as it relates to that issue. Such independent inquiry convinces us that the evidence is sufficient to clearly and convincingly establish actual malice, which the jury found existed on the part of the defendants.

Before we begin our actual malice discussion, though, we first consider two issues necessary to reinstating the jury verdict, namely the defamatory character of the article and proof of falsity.

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pendent review of the whole record under the mandate recently reaffirmed by the Supreme Court in *Bose* in conjunction with the established rule for awarding a judgment n.o.v. While fully embracing the independent review standard, the dissent ignores the important fact that we are reviewing a jury verdict set aside by a judgment n.o.v. This is revealed in the dissent's curious and frequent citations to the "findings" of the trial judge and the dissent's suggestions that those "findings" somehow control our review. *See e.g.*, Dissent at 16, 17, 18, 27, 28, 32, 36, 38-40. The dissent thus takes two wholly contradictory positions. It is precisely *because* this court is *independently reviewing* the whole record that it cannot be bound by any "findings" of the trial judge where, as in this case, the case was tried to a jury, not to the trial court. The trial judge reviewed the evidence once. Now this court must undertake anew that same review independently of the review already conducted by the district court judge. To be bound in the manner suggested by the dissent would "cabin" our review and render it meaningless, *see* Dissent at 6, requiring of this court the impossible task of independent review while still being bound by the district court's findings in support of the judgment n.o.v. Thus the standard of review the dissent proposes is impossible to follow: it contradicts not only Supreme Court precedent, but itself as well, and could not be followed without espousing the most blatant solecisms.

Panel Majority

III. Defamation and Falsity

1. *Defamatory Character of the November 30 Article*

Statements do not constitute actionable defamation merely because they are false. They must be demonstrated to be dafamatory to the plaintiff. As the district court instructed the jury, consistent with the standard in the District of Columbia, a publication is defamatory if it "tends to injure plaintiff in his trade, profession, or community standing, or lower him in the estimation of the community or subject him to scorn, ridicule, shame, contempt or embarrasment" (Tr. 4548). *See Afro-American Publishing Co. v. Jaffee*, 366 F.2d 649, 654 (D.C. Cir. 1966). The Supreme Court has instructed us that "[a] publication claimed to be defamatory must be read and construed in the sense in which the readers to whom it is addressed would ordinarily understand it." *Washington Post Co. v. Chaloner*, 250 U.S. 290, 293 (1919). It is clear that while we must consider each portion of the article specified in the complaint, the words should not be considered in isolation; they must be ascribed their plain and natural meaning in the context of the article *as a whole*. In addition to the plain text, we consider what the article conveys through its structure, implications, and connotations.

The theme of the *Post* article here is expressed in its headline—"Mobil Chief Sets Up Son In Venture" and in the lead paragraph—"Mobil Oil Corp. president William P. Tavoulareas set up his son five years ago as a partner in a London-based shipping management firm that has since done millions of dollars in business operating Mobil-owned ships under exclusive, no-bid contracts." *See* Appendix. William Tavoulareas maintains that the article reasonably implies that he breached his fiduciary duties to Mobil, that he wasted and misused Mobil assets, and that he wrongfully directed those assets to his son Peter for his benefit (Tr. 4550). The *Post* attempts to trivialize the import of the phrase "set up" and argues

that it was "just a simple way of describing how something came to be." Brief of *Post* at 39.

The district court, in ruling on the motion for judgment n.o.v., concluded that the term "set up" "may not be the most felicitous choice of vocabulary that could have been used to describe the situation but . . . it cannot be said that it was a lie or a reckless untruth." 567 F. Supp. at 659. The court similarly rejected, as unreasonable as a matter of law, the conclusion that the article implied that William Tavoulareas put together the whole Mobil-Atlas-Samarco arrangement solely for the sake of his son. *Id.* at 660. The November 30 article, the court said, also does not impliedly accuse Tavoulareas of misusing Mobil assets. *Id.*

We conclude that the district court was in error and hold that both the phrase "set up," in the context used, and the article in general, defame William Tavoulareas.[20] Notwithstanding the fact that some statements in the article may imply that Mobil's involvement with Atlas was purportedly *justified* on legitimate business grounds, the article could reasonably be read to suggest that William Tavoulareas became involved with Atlas-Samarco primarily to benefit his son. Certainly, this was the interpretation that *Post* editors Peterson and Tyler gave the article.[21] Such interpretation by the jury would be

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[20] At trial William Tavoulareas presented evidence that his previous reputation for honesty, integrity, and fair dealing (Tr. 1510-13, 1947-48) was injured by the November 30 article by introducing additional defamatory publications spurred by its publication (Tr. 1977-84, 1995-2018, 2037, 2139-54).

[21] Peterson interpreted the article to charge Atlas was "a $680,00 [sic]-a-year plaything for an indulged son" and in reacting to the article wrote that "[i]t's impossible to believe that [William] Tavoulareas alone could put together such a scheme for the sake of his son's business career" (J.A. 2486). Tyler's responsive memorandum stated:

> Our story does show that Mobil's decisions in this case were not made for the traditional business reasons, or

wholly justified since in this case the article would have little or no news value if it merely intended to report a legitimate business act. At a minimum, the article implies that, irrespective of the motivation for creating the Mobil-Atlas-Samarco relationship, William misused Mobil assets and his position as president to advance his allegedly undeserving son—an act of corporate nepotism. Indeed, this interpretation of alleged nepotism was recognized by the district court as the basic theme of the article. 567 F. Supp. at 660. The caption and lead paragraph clearly connote this. This lead material sets the tone of the article which is not diminished by subsequent statements. On the contrary, the body of the story lends further support to such conclusion. While portions of the article are true, "the defamer may be the more successful when he baits the hook with truth." *Afro-American*, 366 F.2d at 655. The article's seemingly detailed support, which gives the impression that it states facts, lends apparent truth to its accusations. The other statements specifically challenged as false, *see* falsity discussion *infra*, in similar fashion contribute to the defamatory premise of alleged nepotism.

We thus conclude that the November 30 article, in its headline and considered as a whole, would reasonably be understood by the average reader in the community as being defamatory in its implication that William Tavoulareas was guilty of corporate nepotism, breached his fiduciary duty to Mobil, and misused Mobil assets.

> for the reasons stated by Mobil. . . . It should not seem impossible that Mobil—which originally turned down a chance to join Samarco—changed its mind after it dawned on Mobil's president that such a partnership would justify the creation of a small management firm at a time when Tavoulareas' son was aspiring to such a career and was already at work with one of the Greek shippers.

(J.A. 2489-90).

2. *Falsity*

As the district court properly instructed the jury, liability for defamation requires, as part of the plaintiff's case and prior to a finding of actual malice, proof of falsity. *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *New York Times v. Sullivan*, 376 U.S. 254 (1964). Because the jury returned verdicts against the *Post*, Golden, and Piro in favor of William Tavoulareas, it necessarily found that the challenged statements in the November 30 article were false. In granting judgment n.o.v., the trial court found that there was insufficient proof of actual malice and thus did not consider it necessary to address directly the issue of falsity. 567 F. Supp. at 654 n.9. Tavoulareas maintains that the jury's finding of falsity "remains undisturbed" on appeal. Brief of Tavoulareas at 17a-17b. The defendants, while on appeal concentrating principally on the actual malice issue, rest on a general statement "that the story was in fact true." Brief of *Post* at 18.

In the circumstances of this case, the issue of actual malice, which is the major point on appeal, is intertwined with the issue of falsity of the defamatory allegations, since the evidence establishing falsity, and the degree of that evidence, overlaps with and constitutes much of the proof of actual malice. The issue of falsity was briefed and argued before the trial court, and constitutes part of the record that we have reviewed.[22] The

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[22] Discussion of falsity can be found, among other documents, principally in the following: Supplemental Memorandum of Points and Authorities in Support of Alternative Motions of Defendants Post and Tyler, Tavoulareas v. Washington Post Co., Civ. No. 80-3032, Doc. 367 (D.D.C. Oct. 1, 1982); Reply of Defendants Post and Tyler to Plaintiff's Opposition to Alternative Motions, *id.*, Doc. 377 (Nov. 23, 1982); Supplemental Post-Argument Memorandum of Defendants Post and Tyler, *id.*, Doc. 380 (Jan. 23, 1983); Points and Authorities in Support of Motion of Defendant Piro for Judgment n.o.v., Tavoulareas v. Piro, Civ. No. 80-2387, Doc. 348 (D.D.C. Aug. 4, 1982); Plaintiff's Memorandum of Points and

procedural posture of this case, reviewing a grant of judgment n.o.v., makes the question of proof of falsity one of law. We accordingly address the falsity issue, and our subsequent discussion of the issue in connection with malice will implicitly expand upon the same point. For purposes of our review we assume, without deciding, that a showing of falsity requires clear and convincing proof.

Conclusions to be drawn from the evidence in this case, particularly with respect to the issues of falsity and actual malice, depend in large part on the determination of the credibility of the principal witnesses.[23] As previously detailed, we must view the evidence, with all inferences reasonably to be drawn therefrom, in the light most favorable to the party against whom the judgment n.o.v. was ordered, *i.e.*, the plaintiff. *Guam Federation of Teachers, Local 1581 v. Ysrael*, 492 F.2d 438, 439-41 (9th Cir.), *cert. denied*, 419 U.S. 872 (1974); *see* discussion and cases cited in Section II *supra*.

On the key charge that William Tavoulareas "set up" his son in the shipping business, the evidence of truth is (1) Comnas' alleged statement—as testified by Tyler—that Comnas had taken Peter into the firm only because William suggested it and (2) Piro's assertion that William had once said that he had given Peter a "nudge" to get him into the shipping business. As to the first, William Tavoulareas' testimony flatly contradicted Comnas' alleged accusation (Tr. 1425), as did William's prior testi-

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Authorities in Opposition to Alternative Motions of The Washington Post and Tyler for (1) Judgment n.o.v., (2) New Trial, or (3) Reduction in the Amount of the Judgment, *id.*, Doc. 372 (Nov. 1, 1982); Plaintiff's Memorandum of Points and Authorities in Opposition to Motion of Defendant Piro for Judgment n.o.v., *id.*, Doc. 371 (Nov. 1, 1982); Hearing (Revised Transcript) 8-13, 62, 74-77, *id.* (Dec. 16, 1982).

[23] *See* note 16 *supra* and accompanying text.

mony before the SEC (J.A. 2398-2459). The defendants at trial did not produce Comnas' deposition testimony, though he was their *principal source* relied upon for the charges made in the article. Nothing uncovered in the *Post's* massive pretrial discovery and none of the *Post's* witnesses except defendants Piro and Tyler, provides any basis for the charge that William "set up" Peter. As to Piro, Golden testified that at his first meeting with him, Piro told him that "William Tavoulareas had set up his son in a shipping company that made him an overnight millionaire," or "words to that effect" (Tr. 164-65). Piro never denied he said this at that meeting, but only denied using the words "set up" at the subsequent meeting at The Owl restaurant (Tr. 2897). As to defendant Tyler, he is discussed below regarding the "second allegation."

As to the "nudge" statement, even if it can be considered a reference to Peter's landing the job at Atlas instead of his first shipping-related job at Lemos, the jury had only Piro's unsupported recollection of the statement. William flatly denied ever making such a remark to Piro (Tr. 1349). The jury in weighing credibility obviously could accept William's testimony over Piro's.

The second allegation William Tavoulareas challenges as false is that he "personally urged" that Peter be included as an equity partner in Atlas. The statement is unattributed in the article. William Tavoulareas testified that he never urged that his son be included in Atlas (Tr. 1293-94, 1296-97, 1433).[24] Defendants rely on a statement allegedly made in a conversation between Tyler and Comnas for the truth of the statement, *but the de-*

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[24] William Tavoulareas testified that he told his superiors: "It's not a question of helping my son, it's now a question of not standing in his way. I have nothing to do with this thing. George Comnas is asking him [Peter]" (Tr. 1293-94).

fendants never introduced Comnas' deposition at trial.[25] The conversation was received through Tyler's testimony (J.A. 979, 981, 1150, 2054, 2074-75, 2498, 2674, 3141, 3143, 3157), which the jury was entitled to weigh and to credit or discredit as it deemed appropriate.[26] When pressed to relay what Comnas purportedly said to him, Tyler testified that "I don't recall" whether Comnas said specifically that "William *personally urged* him [Comnas] to take his son into the [Atlas] operation," but stated only that he used "words to that effect" (J.A. 981). Piro admitted that he had told Tyler he had "no knowledge" of whether William Tavoulareas had requested or urged that his son be included in Atlas (Tr. 292-93).

The district court, in discussing "actual malice," indicated that Kousi's "nepotistic act" comment could be interpreted to support the "personally urged-set-up" allegation, 567 F. Supp. at 659. However, as to the issue of falsity, there was no evidence that this comment was based on personal knowledge. *See* note 45 *infra*. If the testimony of Tavoulareas is believed and that of the defendants and their witnesses disbelieved, as would have been reasonable for the jury to have found, the allegations are clearly false.

The third allegation in the article was that "the elder [William] Tavoulareas [personally] dispatched . . . Herman [sic] F. Hoffmann . . . to help run Atlas." The defend-

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[25] Defendants also point to a memorandum prepared by the staff of the House Subcommittee on Energy and Power. That memorandum, however, summarizes *Comnas'* statements to subcommittee staff members made during an interview at Comnas' home (J.A. 2467, 2471). Thus, its sole source of truthfulness is Comnas.

[26] Comnas' motivation to offer Peter a position in Atlas may not have been that William had urged it, as appellees assert occurred, but could easily have been that Comnas hoped by doing so he would curry favor with Peter's father, as appellant argues. This is a reasonable inference which the jury was entitled to draw from the evidence.

ants rely on three sources for the truth of this statement: (1) Paul Wolfe's testimony that William Tavoulareas "participated" in discussions where it was decided that Hoffmann would replace Comnas (Tr. 1193); (2) Mobil's November 20, 1979 letter to Tyler stating that William Tavoulareas was involved in *Comnas' departure* (J.A. 2345 (Plaintiffs' Ex. 23)) (presumably, as defendants urge, "to open the door" for Hoffmann's arrival); and (3) Piro's testimony that he had overheard Tavoulareas state to Mobil Vice-President Checket "that he [Tavoulareas] had sent Harmon Hoffmann over to Atlas after Comnas had left" (Tr. 3720-21). The first two of these do not represent a clear assertion that Tavoulareas had any personal hand in deciding that Hoffmann would be dispatched, and are at best very weak circumstantial evidence to that effect. William Tavoulareas testified that he did not personally send Hoffmann to Atlas (Tr. 1440). Paul Wolfe testified that it was *he* who recommended *to Mobil Chairman Rawleigh Warner* (in the presence of William Tavoulareas) that Comnas be replaced (Tr. 1069, 1070, 1098, 1186).[27] Checket denied that the alleged conversation between himself and Tavoulareas ever took place (J.A. 1844-48). Again, if the testimony of Tavoulareas, Wolfe or Checket is believed, which we conclude reasonable inferences from the record permitted the jury to find, the statement that Tavoulareas personally dispatched Hoffmann is false.[28]

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[27] Questioning of Paul Wolfe included the following:

> Q. Mr. Wolfe, if anyone dispatched Harmon Hoffmann to London to help with Atlas, who did it?
>
> A. I did.

(Tr. 1098).

[28] Tavoulareas does not deny that Mobil, *qua* Mobil, sent Hoffmann to Atlas. Given the theme of the article that William Tavoulareas *personally* "set up" his son, the distinction between whether Mobil or Tavoulareas personally sent Hoffmann achieves crucial importance.

In conclusion, our review of the record reveals evidence that, when resolved in the light most favorable to the jury verdict, as it must be, demonstrates convincingly that the alleged defamatory statements in the November 30 article are clearly false.[29] Additionally, our succeeding examination of the record on the "actual malice" question discloses further evidence which, under our prescribed standard of review, demonstrates that the challenged statements are clearly and convincingly false. Rather than to duplicate that discussion here, we refer to our actual malice discussion, *infra*.

IV. Reckless Disregard of Truth or Falsity—Actual Malice

We first note that the defendants have uniformly denied that they knew what they wrote was false or that they had serious doubts about its truthfulness. They have testified that they honestly believed the stories were true. The defendants argue that "[t]his unimpeached testimony as to the mental elements of actual malice is 'dispositive.'" Brief of *Post* at 32. The defendants' apparent claim is that actual malice can be proved only if the reporter or editor confesses to having had actual

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[29] Contrary to any hints by the dissent, our conclusion as to falsity does not "ignore" any evidence presented at trial. For example, regarding the statements made to Tyler by Wolfe and Kousi, and Tavoulareas' own SEC testimony, as explained here and as amplified *infra* in the actual malice discussion, Wolfe merely confirmed that when Mobil began to form an independent shipping company Tavoulareas was involved in recruiting Comnas, and Kousi had no personal knowledge to support his statement that the hiring of Peter Tavoulareas by Comnas was a "nepotistic act." The jury was entitled to find that such circumstantial evidence was clearly outweighed by William Tavoulareas' SEC testimony, which—far from providing evidence that he "set up" his son—denied any role in setting up Peter, and by the testimony of the plaintiffs and other Mobil officers.

doubts regarding the truthfulness of the defamatory articles.

But courts do not labor under such unreasonable rules regarding evidence. As the Supreme Court has noted:

> The defendant in a defamation action . . . cannot . . . automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. *The finder of fact* must determine whether the publication was indeed made in good faith.

St. Amant, supra, 390 U.S. at 732 (emphasis added). Hence, a defamation plaintiff is not required to accept the word of the defendant as to his state of mind any more than the government or a jury is required to take the word of a criminal defendant that he lacked the intent required for a criminal conviction. In *any* case where the mental state of the actor is at issue, it can be proved by the *cumulation* of circumstantial evidence:

> [I]n attempting to meet the test the plaintiff may rely upon "evidence of negligence, of motive and of intent . . . for the purpose of establishing, by *cumulation* and by appropriate inferences," the requisite degree of culpability. Mere statements by the defendant of his belief in the truth of a publication will carry the day only if they are not overridden by evidence establishing knowing or "reckless" falsity.

R. Sack, *supra*, at 214 (footnotes omitted) (emphasis added) (quoting *Goldwater v. Ginzburg*, 414 F.2d 324, 342 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970)). Although recklessness in the defamation arena requires a showing of subjective doubts, *see St. Amant, supra*, 390 U.S. at 731, it "is ordinarily inferred from objective facts." *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967). As the First Circuit has noted:

> The subjective determination of whether [a defendant] in fact entertained serious doubts as to the

> truth of the statement may be proved by inference, as it would be rare for a defendant to admit such doubts. . . . A court typically will infer actual malice from objective facts. . . . These facts should provide evidence of negligence, motive, and intent such that an *accumulation* of the evidence and appropriate inferences supports the existence of actual malice.

Bose Corp. v. Consumers Union of United States, 692 F.2d 189, 196 (1st Cir. 1982), *aff'd*, 52 U.S.L.W. 4513 (U.S. Apr. 30, 1984) (emphasis added) (citations omitted).

The plaintiffs here attempted to demonstrate by a web of circumstantial evidence that the defendants acted with actual malice. Each of the major categories of evidence will be discussed in turn, though their order of appearance is not meant to reflect their relative importance.

1. *The Christine Peterson Memorandum*

After Tyler wrote his first story, it entered into the *Post's* editing process. During the course of that process it was given to copy editor Christine Peterson for editing. After reviewing the article, and prior to publication, Peterson sent a memorandum to assignment editor Peter Milius. The memorandum stated, in part:

> I've read the Mobil story several times, and while I'm impressed with the amount of work the reporter obviously did, I'm still left with an overwhelming sense of So What? Is there any way to give this story of high-level nepotism a dollars-and-cents angle? Did Mobil's shareholders lose anything? Mobil's customers?
>
> *Parts of Tyler's case against Tavoulareas seem tenuous, and the whole—a $680,00-a-year* [sic] *plaything for an indulged son, at worst—just seems like a withered peanut in an 84" gilded shell.*
>
> A far more interesting angle, it seems to me, is Mobil's concern about Saudi preference shipping—a

> concern so profound that it led to the formation of an entire dummy corporation. *It's impossible to believe that Tavoulareas alone could put together such a scheme for the sake of his son's business career, or that he would want to.*

(J.A. 2486) (emphasis added). Peterson, who at the time was still in the employ of the *Post*, testified at trial that when she used the phrase "impossible to believe" she did not really *mean* that the story was "impossible to believe"—only that she felt that "the focus of the story should have been the formation of the company Samarco in anticipation of preference shipping" (J.A. 1837). Peterson, as a *Post* employee, was an interested witness, and the jury was entitled to evaluate her testimony accordingly. It was not obliged to credit her subsequent protestations that she did not really mean what she wrote.[30]

Not surprisingly, the district court found the interpretation offered by the defendants to be "strained." 567 F. Supp. at 655. A reasonable reading of the memorandum is that (1) Peterson read the article as saying that William Tavoulareas led Mobil into the Samarco-Atlas venture substantially as a means of benefitting his son, and (2) she found the charges in the artice, as she wrote, "impossible to believe." This is the district court's independent evaluation of the facts as set forth in the article.

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[30] The fact that a witness is an employee of a litigant is in itself reason for discounting his evidence. As the Supreme Court explained:

> If the evidence is possible of contradiction in the circumstances; if its truthfulness, or accuracy, is open to a reasonable doubt upon the facts of the case, and the interest of the witness furnishes a proper ground for hesitating to accept his statements, it is a necessary and just rule that the jury should pass upon it.

Chesapeake & Ohio Ry. v. Martin, 283 U.S. 209, 218 (1931) (employee of party as interested witness).

The district court, relying heavily on what it felt to be Peterson's relatively minor role in the editing process [31] and the fact that she testified that she had done no independent research on the story, found that she was merely "expressing her uninformed opinion that she found the story hard to believe." (Her actual appraisal was that the article was "*impossible* to believe.") The district court continued:

> If Ms. Peterson had investigated the article's substance and sources and thereafter had expressed a similar statement of doubt as to the article's veracity, plaintiff's argument might prevail. Plaintiff, however, has offered no evidence to this effect. The actual malice test focuses on the state of mind of the author and publisher of the allegedly libelous statements. Ms. Peterson's memorandum *does not show that those who were responsible for the article's substance entertained any doubts whatsoever about its accuracy.*

567 F.2d at 655 (emphasis added).

The district court's conclusion, however, depends entirely upon the court's finding that copy editors at the *Post* have *no responsible* role in preparing articles for publication. The court's opinion implicitly credited the defendants' testimony and its reasonable inferences. Yet, the character of the Peterson memorandum and the responses it evoked within the *Post* organization indicate that her job involved more than mere proofreading. It is undisputed that copy editors are responsible for so-

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[31] Peterson described her job as "copy editor" as "basically edit[ing] a story for style, punctuation, grammar, check[ing] what facts can be checked, with source material at hand, things like the population of the State of Utah or the area of Lake Superior, that sort of thing." 567 F. Supp. at 654. (In weighing Peterson's credibility, the jury doubtless realized that the *Post* defendants and their employee, Peterson, would have an obvious motive to downplay the importance of her job.)

called "style" editing (which involves control over the exact language that will be used in the article) and for checking at least some of the facts in a story. *See* note 31 *supra*. Although at trial she described her position as having a very limited role, Peterson in her memorandum apparently felt free to question the substance of an article, indicate the direction it should take, and suggest substantive changes—the sort of things that persons who *did* have responsibility would do. Moreover, as we shall see, those *Post* employees who unquestionably had final responsibility for the article's content took her comments seriously and did not treat them as the remarks of someone poking in where she did not belong. Thus, it is not clear that even Peterson's ordinary duties gave her no responsibility for the article's content, and a jury reasonably could infer from Peterson's memorandum and the responses it evoked that her job was more responsible than she claimed.[32]

But exclusive concentration on Peterson's ordinary responsibilities is in any event misplaced. The *Post* cannot avoid liability merely by pointing to responsibilities assigned in the newspaper's organizational chart. That an employee's or agent's job duties are so limited is relevant but not dispositive. Peterson's memorandum to Milius, and the reaction of other editors to it, permitted the jury to find that at least one *Post* editor who exercised some responsibility for the story had a serious doubt about the accuracy of the charge made in the article that William Tavoulareas, as president of Mobil Oil Corporation, improperly used his office to "set up" his son in Atlas.[33]

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[32] This is particularly true since the net result of minimizing Peterson's role is so obviously favorable to the defendants. She was the only editor who recorded doubts about the article's accuracy; it is thus plainly in the defendants' interest to show her as isolated as possible from editorial responsibility.

[33] Such serious doubt evidences actual malice:

> [R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would

But even if the district court was correct, and Peterson had only a minor role in the process, her memorandum is still relevant because of the objections it raised. The issue is not whether the memorandum *alone* proves clearly and convincingly that the article was published with actual malice; it is whether it is evidence that, taken in conjunction with other evidence, tends to prove that fact clearly and convincingly. It does. Peterson's appraisal of the story gains force from the reasonableness of its interpretation and conclusion. Thus, looked at in the light most favorable to the plaintiffs, the memorandum indicates that, prior to publication, serious doubts about the accuracy of the article had been voiced within the *Post's* editorial staff and communicated to those who prepared the article. The memorandum was written to Milius, an editor who apparently *did* have responsibility for the substantive aspects of the story. Milius apparently gave the Peterson memorandum enough credence to send it to Tyler for his response. Tyler thus learned that at least one editor doubted the correctness of his central premise. Tyler wrote a memorandum responding to Peterson's which was directed to yet another *Post* editor, Bill Greider, who also had authority over the substance of the article. Though alerted to the "sensitive" nature of the story, Greider testified that he had no "specific recollection" of reviewing with Tyler any of his documents or notes (J.A. 1887-88, 1895-97). Thus, at the very least, reporter Tyler and editors Milius and Greider

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> have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

St. Amant v. Thompson, *supra*, 390 U.S. at 731.

were aware of Peterson's misgivings and may have recognized the merit in her analysis.

Tyler's memorandum to Greider responded specifically to Peterson's statement that the story was "impossible to believe." He acknowledged that "[b]ecause we base a couple of key points in the story on one source, I can see why a *good editor* might say that part of our case against Tavoulareas seems tenuous." (Emphasis added.) But he defended his reliance on that single source—presumably Comnas—because of the source's "background, position in the company and overall credibility" (J.A. 2489-90). (As anyone with passing familiarity with the matters here at issue would have known, Comnas' background was in fact checkered and his credibility highly suspect. *See* section IV. 7.B. *infra.*) Tyler was far more concerned with Peterson's statement that the article was "uninteresting" than her assertion that it was "impossible to believe."

In our opinion it is clear that a jury reasonably could infer from the Peterson memorandum and its surrounding circumstances that (1) serious doubts were circulating within the *Post's* newsroom while the article was being prepared, (2) at least three responsible individuals who participated in reviewing the substance of the article (four, if Peterson's participation is found to have been sufficiently responsible) were aware of such doubts, and (3) the article was published without apparent additional investigation and without substantial change. This evidence *supports* the conclusion that the defendants had reason to believe that the story was false and that they acted recklessly in publishing it.

2. *The Defendants' Motivation*

The plaintiffs in this case produced evidence which, they argue, demonstrates that (1) one defendant, Piro, had strong personal ill-will toward the plaintiffs; (2)

enthusiastic reporters Tyler and Golden were out to "get" the elder Tavoulareas; and (3) the *Post* had a policy favoring sensational exposés. The plaintiffs argue that this evidence—the first two elements of which demonstrate common law malice—provides a *motive* to publish derogatory information without regard to falsity, and hence is evidence that the defendants acted knowingly or recklessly in publishing their falsehoods. The defendants argue that *actual* malice, not common law malice, is required in defamation cases and that the evidence of motive is therefore irrelevant. The district court did not address this issue specifically in its opinion.

It is clear, as the defendants argue, that common law malice is not the equivalent of actual malice in the defamation context, and that common law malice alone will not support a finding of actual malice. *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82 (1967) (per curiam); *Henry v. Collins*, 380 U.S. 356, 357 (1965) (per curiam). Similarly, the mere fact that a newspaper has a general policy favoring sensational or even muckraking stories does not, in itself, prove that a defendant acted with actual malice. *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947, 959 (D.D.C. 1976). But, contrary to the assertions of the defendants, it is equally well settled that the presence of common law malice or evidence that a newspaper followed a sensationalistic policy, because it provides a *motive* for knowing or reckless falsehood, is *evidence* of actual malice. *See, e.g., Curtis Publishing Co. v. Butts*, 388 U.S. 130, 169 (1967) (Warren, C.J., concurring) (defendant had adopted a "program of 'sophisticated muckraking,' designed to 'provoke people, make them mad' ") (footnote omitted); *Goldwater v. Ginzburg*, 414 F.2d 324, 342 (2d Cir. 1969) ("evidence of . . . motive and intent" may help establish actual malice), *cert. denied*, 396 U.S. 1049 (1970); *Bose Corp. v. Consumers Union of United States*, 692 F.2d 189, 196 (1st Cir. 1982) (same), *aff'd*,

52 U.S.L.W. 4513 (U.S. Apr. 30, 1984); *Cochran v. Indianapolis Newspapers, Inc.*, 175 Ind. App. 548, 560, 372 N.E.2d 1211, 1220 (1978) (desire to "get" plaintiff is "relevant and admissible *as evidence* in the determination of whether defendant possessed a state of mind highly conducive to reckless disregard of falsity"); R. Sack, *supra*, at 214 n.168 ("Although common law actual malice—spite or ill-will—is not equivalent to or sufficient to prove constitutional 'actual malice,' evidence as to the former is admissible to prove the latter."). As the Supreme Court of West Virginia explained:

> [W]hen [*Associated Press v. Walker*, 388 U.S. 130 (1967)] and *Curtis* are read together, they still stand for the proposition that *personal motives on the part of a newspaper*, or participation by a newspaper in a plan or scheme to injure, *is evidence of recklessness and willful disregard for truth* which may be considered along with other evidence on the question of actual malice.

Sprouse v. Clay Communication, Inc., 211 S.E.2d 674, 688 (W. Va.), *cert. denied*, 423 U.S. 882 (1975) (emphasis added).

Indeed, a contrary position would appear to be wholly irrational. The mere existence of a preconceived plan to "get" the subject of a defamatory story does not prove that the publisher acted knowingly or recklessly in publishing false information. But it is beyond question that one who is seeking to harm the subject of a story—whether motivated by simple ill will (*Cochran*), or partisan political considerations (*Sprouse*), or otherwise laudable concern for the safety of the nation (*Ginzburg*), or a mere desire to attract attention and boost circulation (*Butts*)—is morely likely to publish recklessly than one without such motive.[34] We turn, then, to the evidence of the defendants' motive to "get" the plaintiffs.

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[34] The dissent rejects the idea that motive can be *evidence* of actual malice when it is not an *element* of the tort. Dissent

Philip Piro. Piro, who had gone through a very difficult divorce from William Tavoulareas' daughter, harbored strong feelings against his father-in-law. The district court in fact found that Piro

> was openly hostile to the Tavoulareas family and undoubtedly harbored a considerable amount of ill will towards them. In addition, Tyler testified that he was very skeptical about Piro's reliability because much of the information he supplied was inaccurate.

567 F. Supp. at 657. That finding is eminently supported by the record.[35] Knowledge by the *Post* of Piro's evident personal animosity against the Tavoulareases was a circumstance, which in combination with other evidence, was probative of a mental state conducive to the reckless disregard of falsity.

Patrick Tyler. Reporter Tyler, unlike Piro, had little reason for *personal* animus against the Tavoulareases. The plaintiffs' evidence purports to demonstrate that Tyler wanted to "get" Mobil and the Tavoulareases, not for reasons of ill will but simply for the sake of a big story and because of Tyler's general bias against the oil industry. The plaintiffs rely on the following evidence:

1. Tyler, in a previous front-page story on the 1979 oil shortage (co-written with another reporter, Neumann) allegedly had seriously misstated the response of at least one Mobil official to Tyler's questions. That official wrote a letter to the editor, published a month later by the *Post*,

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at 21 n.11. The distinction, however, is akin to that between *motive* to kill (*e.g.*, greed or hatred) and *intent* to kill in a murder prosecution. They are not the same thing. The second is an element of the crime of murder; the first is evidence admissible to prove that element.

[35] Piro's happy laughter at the thought of William Tavoulareas getting fired—recorded on one of the Golden tapes—exemplifies his ill will toward his former father-in-law. *See* note 37 *infra*.

in which he claimed he was "astounded" at the reporters' implication that he had been unable to offer an explanation of the reason for the shortage, an implication he called "outrageous." [36] He wrote that he "expect[ed] more responsible reporting" than that reflected in the story.

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[36] The story by Tyler and Neumann in the *Post* stated:

> While American motorists were waiting in gasoline lines earlier this year, U.S. oil firms were importing 9 percent more crude oil than they did in 1978.
>
> . . . .
>
> None of the company officials offered an explanation of how this summer's gasoline shortage was touched off in the face of fast-growing imports.
>
> "We at Mobil don't make or create gasoline lines, that's an industry phenomenon," said Bonner Templeton, a vice-president for supply and distribution.

Washington Post, Aug. 29, 1979, at 1. The story thus implies that Templeton could offer no explanation for the perceived phenomenon. Templeton wrote, rather angrily, to the *Post*:

> I was astounded to read . . . that "none of the company officials [interviewed] offered an explanation of how this summer's gasoline shortage was touched off in the face of fast-growing imports." I was astounded because I was one of the officials interviewed, and spent an hour and a quarter answering all of the reporters' questions and attempting to explain what they saw as a discrepancy. . . .
>
> Apparently, Messrs. Tyler and Neumann did not 1) agree with or 2) understand my explanation. For whatever reason, they did not deem it important enough to include in the story. But to go a step further and contend that I did not even offer one is outrageous.
>
> . . . .
>
> The petroleum business is a complex one, and we don't expect everyone to understand it. But we do expect more responsible reporting than the assertion that we were at a loss to explain something we had explained in detail.

Washington Post, Sept. 26, 1979, at A-24 (letter to the editor of Bonner Templeton).

2. Golden's notes show that after the *initial* joint interview of Piro, Tyler remarked that "[i]t is not every day you knock off one of the seven sisters" (J.A. 789).

3. During the Piro interview, Tyler asked Piro whether "he knew of a family member who would rifle [Tavoulareas'] safe and [x]erox doc[uments]" (Tr. 179). The question was referred to during one of Golden's conversations with Piro; from the tape that was played to the jury, it appears that Piro believed that Tyler was joking, but Golden seemed to consider that the question was serious. Indeed, Golden later reminded Piro that Tyler had asked him (Piro) "to commit a crime." Ex. 308-034801 (Side 2); (J.A. 821). Even the dissent is struck by the "troubling" nature of this evidence. Dissent at 26. If made seriously, which a reasonable jury could conclude it was, this indicates that Tyler was so interested in getting Tavoulareas or Mobil that he would risk arranging a burglary and safe cracking, *i.e.*, commiting a felony to secure evidence. This is indicative of a very reckless state of mind and constitutes evidence of a plan to "get" Tavoulareas; the evaluation of this testimony was for the jury, who could reasonably infer the same.

4. After Tyler saw the Peterson memorandum, which referred to "Tyler's case against Tavoulareas," he wrote his own memo to the editors, acknowledging that he could "see why a *good* editor might say that part of *our case against Tavoulareas* seems tenuous" (J.A. 2489) (emphasis added). The plaintiffs interpret this as an indication that Tyler conceived of himself as a sort of journalistic prosecutor, building a case against Tavoulareas, not a reporter attempting to accurately report facts.

5. After the article appeared, Mobil issued a statement denying the allegations in the story. Tavoulareas went to the *Post's* office to protest and requested a retraction, which was refused (J.A. 1439-42). A few days

after the story appeared, Tyler talked to Golden on the telephone; Tyler told Golden that "[t]he Post laughed at the Mobil statement"; the *Post*, said Tyler, "blew [Tavoulareas] out of the water," and sent him "home with his tail between his legs" (J.A. 857-58).

The evidence produced by the plaintiffs paints a picture of a reporter who, in developing and writing what he described as his "stor[y] of nepotism, reward without merit and favoritism by those who wield vast amounts of power" (J.A. 2488), knowingly adopted an adversarial stance toward Tavoulareas. Such a mind-set, which the jury could reasonably have found, is highly probative of whether he acted knowingly or recklessly in writing his falsehoods.

Sandy Golden. Golden, like Tyler, had no apparent personal animosity toward the plaintiffs. He was then working for a small suburban newspaper, and the evidence shows that he badly wanted a job at the *Post*. In a telehone interview with Piro—Golden tape-recorded it although he expressly told Piro that he was not doing so—he explained his motivation for the Tavoulareas story:

> Obviously, I'm trying to work myself into a job at the *Post* through this story, and that's all well and good.

Ex. 308-034805 (Side 1). Golden expected to get *some* compensation from the *Post*—$50 or $100—but immediate money was not his chief motivation. *Id.* Rather, the Tavoulareas story was to be his ticket to at least a *Post* byline, and perhaps a *Post* job offer.

The Golden-Piro tapes, relevant to the issue of intent, were played for the jury. The jury thus heard Piro and Golden speculating about what Mobil Chairman Rawleigh Warner would do when the story broke, and Piro's obvious pleasure at Golden's suggestion that the elder

Tavoulareas would be fired.[37] The jury also heard Golden's reference to a United States Senator whom Tavoulareas had offended as a "possible enemy" who would be willing to "talk":

> Q Now, on this tape that we have just listened to a U.S. Senator was identified as a possible enemy. Those were your words with the words "possible enemy"; is that right?
>
> A That's correct.
>
> Q Did you mean by that a person who had a motive for revenge against the plaintiff, William Tavoulareas?
>
> A I meant somebody would have a reason to talk about Mr. Tavoulareas, yes.
>
> Q A reason to say bad things about Mr. Tavoulareas?
>
> A Yes.

(J.A. 815.)

In sum, the evidence showed that Golden was an ambitious young reporter looking for his big break. He

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[37] GOLDEN: Why are you convinced that [Warner] doesn't know [about the Tavoulareas-Atlas connection]?

PIRO: Uh, because he strikes me as such an honest guy; a guy who's really above suspicion, you know? And he's not a greedy guy at all, you know? He's nice guy.

GOLDEN: What do you think's gonna happen if in fact he doesn't know?

. . . .

PIRO: I don't know; that's pure speculation. But I know that if I was in his position I probably wouldn't be very happy. (Laughs.)

GOLDEN: Yeah.

PIRO: What do you think, Sandy?

GOLDEN: Oh, I think he's gonna have to . . . get rid of your father-in-law.

PIRO: (Laughs.)

GOLDEN: I think he's gonna have to worry about the . . . stock market, too.

Ex. 308-034801 (Side 1).

was anxious to take part in a "major" investigative story and to earn a *Post* byline. His willingness to engage in activities that are, at best, highly questionable (*e.g.*, surreptitiously recording Piro's conversations and playing them back to third parties) and the almost exclusive focus of his investigation on "enemies" (*e.g.*, Piro and Stockton) who would tend to be biased sources for the story, is evidence that his primary motive in working on the story was to get a *byline* on a *Post* story. As discussed above, such evidence of motive has considerable bearing on whether or not he acted with actual malice.

The Post. The *Post* is a newspaper which seeks, among other things, hard-hitting investigative stories. Robert Woodward, its Assistant Managing Editor at all times relevant to this case, testified that he regularly conducted staff meetings at which he "describe[d] the kind of stories [he] was looking for":

> Q. Did you tell them you were looking for stories that would go on the front page, big, significant stories?
>
> A. Not all significant stories go on the front page. I tried to describe the kind of coverage we should have and how we should direct our efforts, yes, sir.
>
> Q. Did you tell them you were looking for stories with impact?
>
> A. Not precisely that word.
>
> Q. In any of these discussions did you ever use a term such as "I'm looking for something called a holy shit story"?
>
> A. Yes, I did. . . .

(J.A. 2176.) What Woodward meant in exhorting his reporters to come up with the "holy shit" stories is not exactly clear, but a reasonable inference is that Woodward, as editor, wanted from his reporters the same kind of stories on which he built his own reputation: high-impact investigative stories of wrongdoing.[38] During

[38] It seems likely that to most hearers, this phrase would

these meetings with reporters, Woodward also tried to imbue them with the same spirit to which he attributed his success:

> Q. . . . Have you attempted to communicate some of the experiences and perhaps values that you had in your years as a reporter to those working for you after you became assistant managing editor?
>
> A. I try.
>
> Q. Did you once describe your approach to being a reporter with words like, "I guess you have to have a compulsive need to succeed. You have to be insecure and to want desperately to please your boss"?
>
> A. Yes, I did.

(J.A. 2178.) From Woodward's testimony it was proper for the jurors to infer that the *Post* put some pressure on its reporters to come up with "holy shit" stories—a category into which the Tavoulareas story (described by Peterson as one of "high-level nepotism" in the corporate context) presumably fit. Regardless of whether one chooses to characterize this policy as conducive to "hard hiting investigative journalism," or (to borrow Chief Justice Warren's description of the policy of *The Saturday Evening Post* in *Butts*) "sophisticated muckraking," it certainly is relevant to the inquiry of whether a news-

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startle readers, *i.e.*, might make them exclaim involuntarily. Woodward explained that he actually used the phrase to describe stories that were merely "[u]nusual, and perhaps surprising, and relevant and of consequence" (J.A. 2178)—*i.e.*, as a virtual synonym for "newsworthy." To an ordinary observer, however, the phrase would connote an article with more extreme charges than the ordinary run of front-page fare. The jury, which was able to observe Woodward's demeanor throughout his testimony, was not required to believe his explanation of what he meant by using a particular phrase—particularly when that explanation is not the most likely inference.

paper's employees acted in reckless disregard of whether a statement is false or not.[39]

3. *Resolution of Inferences Adverse to the Plaintiffs*

It is settled that in a situation where the facts are ambiguous, the mere selection of the most damaging inference by the reporter does not, *alone*, indicate actual malice. In *Time, Inc. v. Pape*, 401 U.S. 279 (1971), the Court held that *Time* magazine's resolution of one such ambiguity in the light most damaging to the plaintiff did not amount to actual malice:

> Time's omission of the word "alleged" amounted to the adoption of one of a number of possible rational interpretations of a document that bristled with ambiguities. The deliberate choice of such an interpretation, though arguably reflecting a misconception, was not *enough* to create a jury issue of "malice" under *New York Times*.

Id. at 290 (emphasis added). As stated by the Court, this holding makes obvious sense; since the focus of the malice inquiry is *subjective*, not *objective*, the mere selection of a single damaging inference is ordinarily not *sufficient* to prove actual malice. The question is whether the reporter believed that the selected inference was true.

The defendants argue from *Pape* that the *consistent* selection of the inferences most damaging to the Tavoulareases would be irrelevant to the issue of actual malice.

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[39] We obviously are not suggesting that there is something wrong with aggressive investigative reporting, especially where public corporations or public officials are involved. The exposure of wrongdoing by individuals, and especially by public individuals, is one of the highest functions of the press in our society. Newspapers provide a vital service by acting as watchdog for the public. This interest is protected by *The New York Times* actual malice standard. It is not further protected by requiring the jury to blind itself to evidence of editorial pressure for sensationalistic stories.

Brief of *Post* at 62. Such an assertion, however, is entirely inconsistent with the *subjective* nature of the malice inquiry. One who publishes a story containing a damaging inference which he knows or seriously suspects is false is not shielded by the fact that what he wrote was objectively a reasonable inference. Certainly, a defendant's selection of a reasonable inference from among a number of ambiguities, whether damaging or not, may be evidence that he acted without malice. But a defendant's selection of the most damaging inference—an inference which is, in fact, false—may be probative of a determination to incorrectly describe the plaintiff, place him in the most damaging light, and thereby with other evidence demonstrate a state of mind that is probative of a reckless disregard for truth.

Pape offers no support for the defendants' analysis of the editorial conduct here. The Supreme Court explicitly stated only that choices made by reporters in the face of ambiguities were not *enough* to prove actual malice—it did *not* say that they were entirely *irrelevant* to the issue.

This conclusion is buttressed by the Fifth Circuit's holding in *Rebozo v. Washington Post Co.*, 637 F.2d 375 (5th Cir.), *cert. denied*, 454 U.S. 964 (1981). In *Rebozo*, the defendant reporter (Kessler) had written that the plaintiff (Rebozo) had "cashed $91,500 in stolen stocks . . . after he was told by an insurance investigator it was stolen." 637 F.2d at 377. A memorandum written by the reporter acknowledged that it was not entirely clear *who* had actually cashed the stocks, but that one inference was that it was Rebozo, a close friend and associate of President Nixon. The charge that it was Rebozo who had cashed the stocks made it a front page story. In passing on whether summary judgment was proper for the defendants, the court stated:

> This memorandum, *plus the fact that Kessler resolved the uncertainty expressed in it in such a way*

> *as to cast plaintiff Rebozo in the worst possible light and to make for Kessler a front-page story of an episode which otherwise might not have commanded any significant attention*, when taken in a light most favorable to Rebozo, could amount to *evidence* of the reporter's reckless disregard for the truth or falsity of the assertion . . . .

Id. at 382 (emphasis added).

The defendants call *Rebozo* "anomalous," and argue that its holding is "utterly inconsistent with *Pape*." The district court considered that *Rebozo* "is arguably inconsistent" with *Pape*, and stated that "[i]n the absence of any further guidance on the issue from this Circuit or the Supreme Court, this Court is not prepared to consider saving the verdict in this case on the basis of the holding in *Rebozo*." 567 F. Supp. at 658. This reasoning appears rooted in two misconceptions. The first—implicit in the opinions of the district court here and the dissent, *infra*, and the briefs of the defendants—is that the plaintiff must have at least one piece of evidence which, *by itself*, proves actual malice. This has been refuted previously. The plaintiff may clearly and convincingly prove actual malice by a cumulation of many pieces of evidence, no one of which, by itself, is clear and convincing. Though "[a] brick is not a wall," E. Cleary, McCormick's Handbook on the Law of Evidence § 185 (2d ed. 1972), many bricks are.

The second misconception, which perhaps follows naturally from the first, is the contention that *Rebozo* must have held that deliberate slanting or consistent selection of damaging inferences was a piece of evidence which *in and of itself* would prove actual malice. But *Rebozo* merely held that resolution of ambiguities in the most damaging light "*could amount to evidence* of the reporter's reckless disregard for the truth or falsity of the assertion," *id.* (emphasis added)—*i.e.*, some evidence of actual malice. Since *Pape* simply held it was not *enough*

evidence to demonstrate actual malice, the two cases are fully consistent. There is thus no question of "saving" the verdict solely through the logic expressed in *Rebozo*. Evidence of deliberate slanting and consistent selection of damaging inferences may constitute probative evidence of actual malice and must be examined and evaluated, not ignored, in conjunction with all of the other circumstantial evidence produced by the plaintiffs.[40]

In sum, to the extent that the facts known to the defendants, like those in *Rebozo*, were suspectible of more than one possible interpretation, the numerous instances in which the defendants selected the most damaging—and most sensational—alternative is *some* evidence which a jury, and an appellate court on review, can evaluate in determining whether publication was made with reckless disregard of whether it was false or not.

4. *Suppression of Information Favorable to the Plaintiffs*

The plaintiffs also presented evidence that the defendants had information which put the transactions involved in a light more favorable to the plaintiffs and Mobil, and which was deliberately excised or suppressed during the writing and the editing of the story in order to strengthen the "case against" the Tavoulareases. The district court examined several of these pieces of information which were known to Tyler but were not included in the story:

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[40] The *Post* argues in a footnote that *Rebozo*, if it applies at all, must be limited strictly to summary judgment motions, not judgments n.o.v. Brief of *Post* at 63 n.52. The two motions are of course, distinguishable. But the *Post* offers no rational explanation for why this evidence (when alleged) is relevant to whether the parties must go to trial, but (when proved) is *irrelevant* to whether the case can go to the jury. If the evidence when proved would be irrelevant, it would be equally irrelevant on a motion for summary judgment. The converse is also true.

1. Lewis Lapham, an outside director of Mobil, told Tyler that the Mobil board had "consistently reviewed the relationship between Mobil and Atlas and . . . was *completely satisfied with all aspects of it.*" 567 F. Supp. at 658 (emphasis added).

2. Lapham told Tyler "that he did not believe that plaintiff [William Tavoulareas] played a personal role in Atlas and that at key board meetings plaintiff would leave the room to facilitate the opportunity for more open discussion of the subject." *Id.*

3. There was considerable evidence that "Mobil profited significantly from [the Samarco-Atlas] relationship and that Atlas was not merely a fly-by-night organization set up solely for Peter's benefit." *Id.* at 659. Both John Kousi, a Samarco director, and Comnas, the defendants' main source for the *Post* article told Tyler that Atlas could run Mobil's ships more cheaply than the oil company could.

Early drafts of the story *did* contain some of this information, but it was *eliminated* from the final version during the editing process. On early draft, for example, stated:

> During these briefings [on Atlas-Samarco dealings] by Warner, Lapham said, Tavoulareas would leave the room. Lapham said he still believes Warner's account of events and rejects any suggestion that Tavoulareas took a personal role in Atlas.
>
> "There's nothing to any of that," Lapham said. "It was explained to the satisfaction of the board."

(J.A. 2528). The defendants argue that while Lapham's specific words were cut out, the point he made was not. But proof of the point was placed on weaker grounds. As a substitute for Lapham's *specific statement* that Tavoulareas went so far as to leave the room during board discussions of Atlas, and that there was "nothing to [the

suggestion that Tavoulareas took a personal role in Atlas]," the defendants point to the following passage from the article:

> Mobil chairman Warner says he assured directors in board meetings that Tavoulareas "does not participate in any decisions regarding Mobil's business with Atlas."

Thus, the article substituted an "assurance" by Warner (an inside director) for a concrete statement by Lapham (an outside director)—a substitution that considerably weakens the point, particularly when an underlying theme of the *Post* article was that Tavoulareas' mere position as president constituted internal corporate influence that implicitly affected the Atlas operation.

Next, in place of Lapham's direct statement that the Mobil board "was completely satisfied" with the Samarco-Atlas relationship, the article stated:

> The Mobil board of directors was told from the outset about the Atlas arrangement but was assured that company president Tavoulareas was not involved in his son's venture in any way.

Thus, instead of a direct assertion of an unimpeached *outside* director that the board had investigated and were "completely satisfied," the article states merely that the director were simply "assured" by an unidentified "someone" that there was no impropriety. This clearly understates the force of the information provided by Lapham.

Lapham's statements that the board had "consistently reviewed" the Atlas arrangements and that he was convinced that William Tavoulareas had played no personal role in Atlas were simply ignored.

The *Post* article also disregarded other evidence that tended to describe the arrangement in a light more favorable to the plaintiffs and to Mobil. In evaluating the economic impact of the arrangement, for example, the

defendants ignored the information from Kousi (whose favorable comments were deleted during the editing process) and even the comment furnished by their principal source, Comnas, that the Atlas arrangement saved Mobil money (J.A. 2501). The defendants contented themselves with allusion to "millions of dollars in business" and "exclusive, no-bid contracts," which strongly implied that Mobil was being exploited and gouged by an *irregular* arrangement in which Tavoulareas had "set up" his son. Similarly, the story failed to include or refer to two internal Mobil memoranda which were prepared at the time the Samarco-Atlas arrangement was created and which Tyler had in his possession. One memorandum instructed Mobil personnel that all business dealings with Atlas were to be conducted at "arm's length"; the other, written by William Tavoulareas himself, specifically directed Vice President Wolfe to bypass Tavoulareas and report directly to Chairman Warner on any Samarco-Atlas matters.

Thus, it is apparent that the district court had a firm basis for stating that Tyler "attempted to understate" the plaintiffs' side of the story, *i.e.*, slanted the story against the plaintiffs.[41] The court, however, concluded

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[41] The dissent does not question that the selective omission of certain facts can create a false and defamatory meaning. Indeed, in the opinion-fact context my dissenting colleague joined in a dissenting opinion that stated:

> The author's recountal of some of the background facts normally creates the inference that there are no other facts pertinent to the opinion expressed; absent some contrary indication, recipients of the communication would naturally derive that understanding. . . . [I]t incorporates a falsehood by inference. The communication is really a false and defamatory representation that, squarely on the basis of such facts as were disclosed, the subject of the comment is guilty of the defamatory behavior charged.

Ollman v. Evans, 750 F.2d 970, 1027 (D.C. Cir. 1984) (en banc) (Robinson, C.J., dissenting, joined by Wright, J.) (footnote omitted).

that such slanting did not "show that [Tyler] acted in reckless disregard of the truth" 567 F. Supp. at 659 (footnote omitted). Tavoulareas, wrote the district court, "cannot force *The Post* to include facts that he believes to be important." *Id.* This is true. But the issue here is whether evidence of selective reporting of particular facts in order to slant the story, to present an essentially untruthful and highly damaging picture, is *relevant* to the defendants' state of mind at the time the article was published. Unquestionably, a writer of an article who knowingly suppresses the facts that would prove its falsity is morely likely to have doubts about the accuracy of his defamatory story than one who either has no such knowledge or has endeavored to present the facts fairly. The writer who suppresses favorable facts is more likely to suspect that his version is not substantially true. Hence, courts have held repeatedly that the choices of *which* facts to report *is* relevant to the question of actual malice. *See, e.g., Time, Inc. v. Ragano,* 427 F.2d 219, 221 (5th Cir. 1970) (failure to include fact that plaintiff was attorney when implication of article would lead people to believe he was organized crime figure); *Wasserman v. Time, Inc.,* 424 F.2d 920, 922 (D.C. Cir.) (same), *cert. denied,* 398 U.S. 940 (1970); *Montandon v. Triangle Publications, Inc.,* 45 Cal. App. 3d 938, 943-44, 120 Cal. Rptr. 186, 189 (omission of key fact in otherwise truthful statement held evidence of reckless disregard of truth), *cert. denied,* 423 U.S. 893 (1975); *Indianapolis Newspapers, Inc. v. Fields,* 254 Ind. 219, 259 N.E.2d 651, 662 (time discrepancy known to reporter and witnesses' repudiation of key fact mentioned only once during series of articles held evidence of actual malice), *cert. denied,* 400 U.S. 930 (1970).

Similarly, deliberate slanting is further evidence of a purpose to "get" the plaintiff and is thus probative of actual malice. The desire to place a plaintiff in a bad (and sensational) light is indicative of a state of mind

conducive to acting in reckless disregard of the truth. This evidence of motive, without more, does not prove actual malice. But, as demonstrated previously, it defies logic to argue that it is not *relevant. See Butts, supra,* 388 U.S. at 169 (Warren, C.J., concurring); *Goldwater v. Ginzburg, supra,* 414 F.2d at 336-37; *Airlie Foundation, Inc. v. Evening Star Newspaper Co.,* 337 F. Supp. 421, 424 n.9 (D.D.C. 1972).

The editorial process by which the defendants selected which facts they would print, and which they would suppress, was a factor the jury could take into account in reaching its conclusion as to actual malice.

5. *"Personally Dispatched": The Checket Conversation*

One of the allegations made in the article was that William Tavoulareas had *personally* "dispatched" Mobil shipping executive Harmon Hoffmann to Atlas following the resignation of Comnas. It is undisputed that *Mobil* made Hoffmann available to serve as interim head of Atlas, but Tavoulareas asserts that he personally did not send Hoffmann. The article's claim that Tavoulareas participated personally obviously undercuts the statements of Mobil officials that he removed himself from dealing with Atlas. The assertion in the article hence is a key point in the "case against" Tavoulareas that the defendants attempted to make in the article.

Tyler, in his testimony, claimed that he based this assertion on (1) Piro's statement that he overhead a conversation on an airplane between Tavoulareas and Mobil Vice President Everett Checket in which Tavoulareas said that "he had sent" Hoffmann to Atlas, and (2) Checket's "confirmation" of that conversation (J.A. 2089-90). The district court, in evaluating this point, ignored Piro's evidence (it had already found him to be unreliable) and cited as the basis of the statement only Tyler's "note of a conversation he had with . . . Checket

that *confirmed* that the plaintiff had stated that he sent Hoffmann to Atlas." 567 F. Supp. at 661 (footnote omitted) (emphasis added).[42]

According to Checket, however, he *never* "confirmed" this point. In his deposition, read to the jury, he stated that he did not "recall . . . any conversations in that regard having taken place on an airplane" (J.A. 1844). He was asked, "What did William Tavoulareas say to you, if anything, on the subject of Harmon Hoffman[n]'s departure for Atlas?; he replied, "*He did not say anything to me about it*" (J.A. 1846) (emphasis added).

> "QUESTION: Do you recall if Mr. Tyler asked you if on that plane trip William Tavoulareas told you that Hoffmann had been sent to London to get things in shape? That was the nature of Tyler's question to you?
>
> "ANSWER: No, that was not the nature.
>
> "QUESTION: He did not ask you a question about a plane ride with Mister—
>
> "ANSWER: He did ask about the plane ride. He did ask about the conversation with reference to Mr. Hoffmann going to London to be with Atlas.
>
> "QUESTION: Did you say to Mr. Tyler that you were somewhat familiar with that conversation?
>
> "ANSWER: *No.*

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[42] Wolfe's written statement to Tyler said only that William Tavoulareas "played a minor role" in the departure of Comnas, and that Mobil had made Hoffmann available to act as interim manager of Atlas. The allegation that Tavoulareas "personally dispatched" Hoffmann is dependent entirely upon Piro and the questionable notes on Tyler's conversation with Checket—which Checket's testimony categorically denies.

The dissent claims that Tyler's third source—Wolfe's confirmation—supports the "personally dispatched" statement. Dissent at 33 n.18. But far from providing the support that the dissent would like to accord it, Tyler's testimony states only that "Paul Wolfe had confirmed that Mr. Hoffmann had spent a period of time at Atlas in 1975 after Mr. Comnas had departed" (Tr. 3720).

(J.A. 1847-48) (emphasis added). In other words, Tyler's notes stated that Checket had *confirmed* a point which Checket had in fact *denied*. The district court recognized the discrepancy. It stated, however:

> Tyler may, therefore, have been negligent in transcribing Checket's statement but plaintiff introduced no evidence that would show that Tyler deliberately falsified this document.

567 F. Supp. at 661 n.18.

This observation erroneously adopts the inference from the evidence that defeats rather than supports the jury's verdict—and the less plausible inference to boot. The defendants argue that the *only* possible inference that can be drawn from this conflict is that Tyler acted in good faith but was negligent. But the record does not contain any support for the suggestion of negligence. One of Tyler's specific purposes in calling Checket on the telephone was to inquire about the conversation on the airplane. It seems difficult to believe that a reporter could *accidentally* note that a source had *confirmed* a key point when, in fact, he had *denied* it. It is more plausible that either Tyler or Checket was being less than truthful about their conversation. Looking at the conflict in the light most favorable to the plaintiffs, as we must, it is clearly possible that Tyler deliberately falsified his notes. The jury observed Tyler's demeanor on the stand, and it heard Checket's deposition. Under such circumstances credibility was a factor for the trier of fact. It was inappropriate for the district court to resolve the credibility factor against the plaintiffs in granting a judgment n.o.v. *See* note 14 *supra*. Our evaluation of the entire record does not compel us to discredit Checket's testimony.

6. *The SEC Paragraphs*

Plaintiff William Tavoulareas contends *on appeal* that the defendants' "case against" him included further defa-

mations in the November 30 article, *i.e.*, that as part of the article Tyler, through statements of purported "fact," implied that "Mobil officials" violated federal securities laws by failing to report Atlas activities to the SEC and Mobil shareholders:

> That [Mobil-Atlas-Samarco] relationship [involving father and son] is not illegal, but securities law requires that Mobil officials report it fully to their stockholders. Mobil claims it did, but that is in dispute.
>
> . . . .
>
> Mobil officials did not tell their stockholders about the son's involvement in Atlas until two years later.
>
> . . . .
>
> U.S. securities law requires that corporate officials disclose the details of business transactions between companies and relatives of the companies' executives. The law was designed to protect shareholders from business decisions based on favoritism.
>
> In recent days, the SEC has reopened its investigation into the role Mobil's president played in his son's partnership in Atlas.

See Appendix. The district court instructed the jury as follows:

> Among the general, non-specific allegations of the first article which you may consider in connection with your *evaluation of the specific charges* the Post defendants stated that federal securities law requires Mobil officials to report the relationship of William and Peter Tavoulareas as father and son to Mobil Corporation's shareholders. . . .
>
> . . . This [SEC] regulation requires a corporation to report transactions involving the son of an officer or director only if the son lives in the same household as the officer or director.
>
> It is for you to determine whether the Post accurately reported that the regulation had been violated.

(Tr. 4557-58) (emphasis added). The district court instructed the jury that

> in determin[ing] whether the [*Post*] articles are libelous, you are to consider each portion of the article, which plaintiffs have *specified* as libelous in the context of the articles as a whole.

(Tr. 4548) (emphasis added).

William Tavoulareas' original complaints did not *specifically* allege these SEC paragraphs as libelous. Prior to trial he moved the district court, on the basis of evidence adduced during discovery, to amend his complaints to include the specific SEC paragraphs mentioned above. The district court denied the motion, and the plaintiff was thus limited to those *specific* allegations pleaded in the original complaints (J.A. 707-08). Thus, contrary to Tavoulareas' contentions, it is clear that these paragraphs cannot serve as the basis of liability, and that was the effect of the court's instruction—such "non-specific allegations" could only be considered in connection with "the evaluation of the specific charges" (Tr. 4557-58). The defendants therefore correctly argue that these statements of alleged SEC violations are not properly before this court *as a basis of liability*. Brief of *Post* at 44-45.

But as the district court ruled in a pretrial order to plaintiffs' motion to amend the complaints, evidence of libels not *specifically* pleaded in the complaints are nonetheless admissible as to issues such as "the state of mind of defendants or as to some other issue related to those defamations pleaded *specifically* in the original complaints" (J.A. 708) (emphasis added). We note that during trial *both* parties introduced evidence relating to these alleged SEC violations, though some dealt with allegations regarding the December 1, 1979 article. Both parties also argued the relevance of this evidence to the jury.

In sum, we decline to hold—as the trial judge declined to permit the jury to find—that the allegations regarding SEC violations could be a basis for recovery; but these allegations could properly be considered by the jury as evidence of the malice of the defendants with regard to those specific allegations that were the basis for recovery.

7. *Reliability of Sources*

Plaintiffs next argue that the defendants' heavy reliance on two sources—Comnas and Piro—whom the defendants knew or should have known were biased and unreliable, in itself demonstrated reckless disregard for the truth. It is settled that "recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *St. Amant v. Thompson, supra*, 390 U.S. at 732. If the defendants had reason to doubt the truthfulness and accuracy of Comnas and Piro, and still relied on their representations, that fact may be taken into consideration by the jury in determining actual malice.

A. *Piro*

Defendants do not attempt to argue that they could properly have relied on Piro for key allegations. His willingness to speak from ignorance and his obvious bias against the Tavoulareases are self-evident. Instead, the defendants argue that they really *didn't* rely on him, although he was quoted and cited several times in the article. The district court, in granting the judgment n.o.v., stated:

> The fact that Dr. Piro may have been an unreliable informant is irrelevant, however, because he was not a primary, or even a secondary, source for the November 30 article. He may have been the person who rekindled *The Post's* interest in the Atlas story but, because of Tyler's skepticism, *The Post* relied on other sources as authority for *many* of Piro's remarks.

567 F. Supp. at 657 (emphasis added). This seems an over generous evaluation of the reliance on Piro that is self-evident in the article.

It appears from the record and from the story that at least two very significant allegations of "fact" in the story are based *entirely* on Piro. First:

> Philip Piro, a Baltimore eye surgeon and former son-in-law to the elder Tavoulareas, who is now estranged from the family, said Tavoulareas expressed his interest at the time [Atlas was being created] as "giving Peter a little nudge to get him along."

The obvious import of this paragraph is that *William Tavoulareas had admitted he had "set up" his son.* In its context, it is used to support the allegation, made several paragraphs earlier, that Tavoulareas had "personally urged" that Peter be included as a partner in Atlas; it is used almost as an admission on the part of Tavoulareas. And the *sole* basis for this statement is Piro. The *Post* and the district court are therefore in error in asserting that Piro was not relied on for very substantial portions of the defamatory allegations. In fact, the direct implication of Piro's statement formed the underlying theme for the entire article and was set out in the headline because it represented the basic charge in the article. The tremendous importance of a headline, as acknowledged by the *Post* editors at trial, was argued to the jury (Tr. 4348).

In addition, it is clear from the preceding discussion in section IV.5. that Piro was the *only* source Tyler had for the charge that Tavoulareas "personally dispatched" Hoffmann to Atlas. This charge similarly acts as an alleged admission by William Tavoulareas that he played a very substantial role in Atlas. Tyler thus relied on Piro's unsupported word even in the face of what the jury could find to be directly contradictory evidence from Checket.

Even the "personally urged" allegation on which the whole story turns is based in part on Piro. It is among a list of "facts" attributed to "a source close to the Tavoulareas family [*i.e.*, Piro] and those familiar with the formation of Atlas [*i.e.*, Comnas]." The defendants now assert that while these facts in the article were specifically attributed to Piro, he was in reality *not* their source.[43]

On the contrary, the jury was entitled to find from the assertions made in the stories themselves that the defendants relied wholly on Piro for the "little nudge" comment and partially on him for the "personally urged" statement. They could find that they relied on him entirely for the "personally dispatched" allegation. The jury was not, nor are we, required to credit Tyler's *post hoc* assertions that he did not rely on a source that he actually quoted in the story as the basis for the statement. Given Piro's ignorance of the Mobil-Samarco-Atlas relationship and personal animus against William—which Tyler and the *Post* acknowledge and with which they were familiar (Brief of *Post* at 57 n.47)—reliance on him for crucial facts could be probative of actual malice.

B. *Comnas*

According to Tyler, the *key source* for the story was Comnas.[44] Since (1) the Post *did not introduce Comnas'*

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[43] The defendants thus presumably would have us infer that the phrase "a source close to the Tavoulareas family" was inserted simply to add an illusion of extra veracity by falsely implying that the information was obtained from multiple sources.

[44] Woodward and Greider concurred. Woodward testified that Comnas was the *Post's* "key witness" and that "[s]o much of this seems to hinge on George Comnas" (J.A. 2181, 2193). Greider testified that Comnas was a "very important source" and the "principal source" for the story (J.A. 1895, 1904).

deposition at trial, (2) Tyler did not record his conversations, and (3) Tyler's notes, as demonstrated by the Checket incident, are not particularly reliable, it is difficult to tell exactly what he told Tyler. Assuming that he *did* tell Tyler that it was pressure from William Tavoulareas which led him to include Peter, the plaintiffs argue that reliance on Comnas as a source was itself evidence of actual malice.

According to the defendants, Comnas was the chief source for the allegation that Tavoulareas "set up" Peter by "personally urging" his inclusion in Atlas. It does not appear that Tyler and Golden had any other source (except Piro, whom they vigorously disclaim for this allegation); it is not supported by Tavoulareas' SEC testimony, or by Kousi,[45] or by anyone else within or without the companies involved. In the absence of such corroboration, the absence and credibility of Comnas become crucial.

The plaintiffs argue that Tyler and Golden knew from their investigations that Comnas had been thrown out of Atlas for fraudulent practices. At trial, Piro testified that he told Tyler and Golden that "George Comnas had been caught in some fraud involving Atlas, that he was forced to withdraw and that if Comnas ever gave Peter and Atlas any trouble Comnas would be reported to the

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[45] The defendants rely heavily on John Kousi's opinion, quoted in the story, that Peter's involvement in Atlas was a "nepotistic act." But while Kousi's deposition (used at trial) acknowledges his use of that phrase, it contains no supporting facts to demonstrate the basis for Kousi's statement that William Tavoulareas was involved in setting up Peter in Atlas, and provides no support for the assertion that William personally urged Comnas to bring Peter in as a partner. It is clear from his deposition that he had no particular knowledge of how Peter originally came to be involved in Atlas, and he did not purport to offer more than his *opinions* on the subject. Those opinions, while possibly relevant, provide no evidentiary foundation for Comnas' assertion that William "personally urged" that his son be included in Atlas.

tax authorities" (J.A. 1857-58). Kousi had heard talk that Comnas was "corrupt," had been "discharged" from Exxon after he was "involved in a scandal in Italy," and that the Samarco directors did not oppose his removal from Atlas (J.A. 1990-91).[46] Kousi's deposition does not specifically indicate whether or not he passed this information along to Tyler. Tyler testified that he had specifically *asked* Kousi about Piro's suggestion that Comnas had been involved in fraud, and that Kousi "said he knew of no allegations of wrongdoing as to George Comnas" (J.A. 2121-22). But Kousi, on the other hand, stated that he answered Tyler's questions at the time "truthfully and accurately, to the best of my recollection" (J.A. 1926). This is another instance where Tyler's testimony varies from that of his alleged informant.

The defendants apparently do not dispute they had been told by Piro that Comnas had been engaged in some fraud at Atlas (J.A. 1857-1858). Tyler was aware of this in November 1979, and hence, even by the defendant's standards, *infra*, this was sufficient knowledge to require Tyler to make an adequate investigation of Comnas' credibility. Brief of *Post* at 53. The defendants argue that they checked on Comnas through other sources, and had good reason to believe that he was credible. Specifically, they point to (1) Comnas' "Who's Who" listing, which indicated that he was an experienced shipping executive; (2) William Tavoulareas' SEC testimony, at which Tavoulareas "never hinted at any improprieties," and stated "that Mobil 'had every confidence in the world' in Comnas"; (3) Mobil Vice President Paul Wolfe's failure to say anything bad about Comnas when interviewed by Tyler; and (4) the *alleged* statement of Kousi (offered by Tyler) that the knew

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[46] The "scandal in Italy" apparently involved solicitation of bribes and involvement in illegal payments while working for Exxon in Italy.

nothing discreditable about Comnas. Tavoulareas' testimony and the statements of Wolfe and Kousi (if Tyler's recounting of his conversation with Kousi is believed) certainly might provide some basis for finding that reliance on Comnas' essentially uncorroborated statement about the "set up" charge was reasonable. But the issue is what the reporters knew or suspected. Piro's statements alerted them to the possibility that Comnas had been engaged in illegal activities. Even without confirmation by Kousi, these statements certainly provide a basis for finding that the defendants knew Comnas had been involved in unsavory business practices and his credibility accordingly was suspect. Tyler's memorandum in response to Peterson's stated, with obvious reference to Comnas, "a couple of *key points* [were based on this] one source." (Emphasis added.) However, *after Tyler learned of allegations of dishonesty*, Comnas' credibility could hardly be supported by relying on no more than a "Who's Who" listing, a failure of Paul Wolfe in his interview with Tyler to volunteer anything bad about Comnas (though not specifically asked), and William Tavoulareas' failure (again when not specifically asked) to charge Comnas with fraud and his statement in SEC hearings of "having every confidence" in Comnas. The only other alleged verification was Tyler's version of the statement by Kousi, which the jury was entitled to discredit by Kousi's own testimony.

Moreover, there is other evidence in the record which provides a basis for finding personal animus on the part of Comnas known to the reporters. It is undisputed that Tyler knew that Comnas was forced out of Atlas. The plaintiffs claim it was due to fraud and dissatisfaction with his performance; the defendants imply that it was to give Peter Tavoulareas a bigger share of the business. Under either scenario, Comnas could not be expected to be fair and impartial regarding those who had forced him to leave Atlas. It appears undisputed that Comnas

did not have good relations with *any* of the Samarco partners.[47]

The district court in its opinion found specifically that "Tyler was fully aware of the allegations of Mobil's and/or Samarco's dissatisfaction with Comnas' business prowess." 567 F. Supp. at 657 n.12. The court discounted this knowledge entirely, on the ground that lack of business acumen "would not appear to reflect poorly on [Comnas'] credibility as a source." *Id.* But while inability to manage a business effectively is not exactly a crime of moral turpitude, the question is whether Comnas had a readily apparent motive to lie. In this case it is not difficult to discern that he had such motive, and such motive could be considered by the jury in determining whether Tyler recklessly relied upon his assertions.

The defendants assert that even if they knew of facts that would impeach Comnas' veracity, his "possible animus toward appellant does not preclude the Post from reporting what Comnas said." Brief of *Post* at 56. As stated, this is a truism, for "even if . . . [spoken] out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth." *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964). But it assuredly does *not* follow that, as the defendants maintain, "reliance on such a source cannot as a matter of law permit an inference of actual malice." The defendants, curiously enough, cite for this proposition *St. Amant v. Thompson*, *supra*, a case in which the Supreme Court held specifically that reliance on questionable sources *would* be evidence of actual malice, although it found

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[47] There was further evidence, introduced through Kousi's deposition, that Comnas was unable to get along with the Saudi partners in Samarco, that he had denigrated the educability of Saudis, and that *none* of the Saudi partners considered Comnas capable of running Atlas adequately (J.A. 1991-94).

the evidence in that case insufficient. *St. Amant* plainly does not support the defendants' position.

Reliance on the unsupported word of obviously biased sources for key allegations is *evidence* which a jury is entitled to consider in evaluating the existence of actual malice.[48] This court on review is similarly entitled to consider this evidence. There was evidence in this case from which a jury could determine that Comnas was ousted from Atlas for engaging in irregular business activities, that Tyler was aware of such activities, and that Tyler had doubts about his veracity. Yet Tyler disregarded these doubts in giving vent to Comnas' allegations.

8. *Other Indicia of Actual Malice*

There is other evidence present in this case which has been held in other cases to constitute evidence relevant to the issue of actual malice, and in our review of the record we give such evidence the same probative value.

First, the article clearly charged William Tavoulareas with corporate nepotism, strongly hinted that the Samarco-Atlas arrangement involved misuse of corporate assets and that Tavoulareas and Mobil had been less than candid with Mobil shareholders. The defendants certainly were aware that such charges would have a serious impact on the reputation of William Tavoulareas and might accomplish their expressed intent, in effect, to "get" him.[49] Knowledge of the harm likely to follow publication of a story is relevant to whether it was published with actual malice. *Curtis Publishing Co. v. Butts*, 388 U.S. 130,

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[48] Again, as with most circumstantial evidence, reliance on the unsupported testimony of biased witnesses is not sufficient *in and of itself* to prove actual malice, but must be considered with the totality of the other evidence.

[49] Indeed, Golden and Piro speculated on the telephone that the revelations might cause Tavoulareas to be dismissed from his position as president of Mobil.

170 (1967) (Warren, C.J., concurring) ("knowledge of the harm that would likely result from publication of the article" is relevant to actual malice determination); *see Mahnke v. Northwest Publications, Inc.*, 280 Minn. 328, 160 N.W.2d 1, 9-10 (1968) ("gravity of the charges in this story was a factor to be considered by the jury in assessing the conduct of the defendant" on the issue of "actual malice").

Second, the defendants were under no time constraint in preparing their story. This was not a fast-breaking news story; the events at issue had occurred years earlier. There was no significant deadline pressure.[50] The defendants had ample time to search for corroboration of Comnas' statements. Actual malice may be more difficult to prove when a defamatory falsehood is published under heavy deadline pressure. The converse is equally true. Falsehoods uttered at leisure are more likely to be deliberate than those published in haste. Absence of time pressure in this case is evidence that the jury could fairly consider. *See Carson v. Allied News Co.*, 529 F.2d 206, 211 (7th Cir. 1976) (grant of summary judgment reversed; story was not "hot news" and "defendants were not bedeviled by an early deadline"); *Goldwater v. Ginzburg, supra*, 414 F.2d at 339; R. Sack, *supra*, at 215-16. *See also Vandenburg v. Newsweek, Inc.*, 507 F.2d 1024, 1026 (5th Cir. 1975) ("when the story is not 'hot news,'

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[50] The dissent asserts that the defendants *were* under substantial time pressure to produce the story because a congressional committee would soon release some information and there was a possibility that the rival *New York Times* might come out with the story. Dissent at 35. But this sort of self-generated time pressure—the fear that someone else will preempt the "scoop"—almost always exists. To hold that it was exculpatory would exalt the time pressure excuse into an absolute defense in every case. It would also reward the least responsible journalists, permitting them regularly to scoop their more careful colleagues, making the scoop itself the justification for their recklessness and generally debasing the journalistic coinage.

as is the case here, the investigation must be more thorough").

Third, after the story had been published, the *Post* steadfastly refused to retract the story, and refused to print a letter from Tavoulareas setting forth his position. The Supreme Court held in *New York Times* that "failure to retract upon [the plaintiff's] demand . . . is . . . not *adequate* evidence of [actual] malice for constitutional purposes." 376 U.S. at 286 (emphasis added). This is unquestionably true. The mere refusal to retract is not sufficient evidence, *by itself*, to prove actual malice. The defendants then take the next giant step and argue that it is entirely irrelevant. But the very language used by the Court—"is not *adequate* evidence"—flatly refutes the assertion that refusal to retract may not be *some* evidence of actual malice. The Court's language makes no sense under the defendants' construction of the law. The correct view, as stated by the Fifth Circuit, is that "[u]nder certain circumstances evidence [of a refusal by a publisher to retract a statement after it has been demonstrated to him to be both false and defamatory] . . . might be relevant in showing recklessness at the time the statement was published." *Golden Bear Distributing Systems of Texas v. Chase Revel, Inc.*, 708 F.2d 944, 950 (5th Cir. 1983) (quoting Restatement (Second) of Torts § 580A comment d (1977)).[51]

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[51] It is likewise true that refusal to retract may, in certain circumstances, be evidence that there was *no* actual malice: the refusal may show that the publisher believed and still believes that the falsehood was true. That a particular piece of evidence may point both ways, however, does not mean that it is not evidence. The reasonableness of the refusal (*e.g.*, how strong was the showing of falsity?) might be some indication of which inference was more likely. When a given fact is susceptible of two reasonable inferences, it is for the jury to determine which one it will adopt. *See* Time, Inc. v. Hill, 385 U.S. 374, 394 n.11 (1967). The jury here made that determination adverse to defendants.

9. *The Defendants' Evidence*

The defendants place a great deal of emphasis on three factors which were presented to the jury and to which the jury evidently did not give controlling significance: the defendants had (1) "done exhaustive research," (2) "given William and Peter Tavoulareas and Mobil ample opportunity to comment," and (3) "reported the Tavoulareases' and Mobil's viewpoint at great length" in the story. Brief of *Post* at 18.

The Reporters' "Exhaustive" Work. Tyler worked on the story over a 30-day period. It is clear from the record that both he and Golden expended at least a fair amount of time on research. The details of his investigation were presented at some length to the jury. But the amount of effort put into a story is only one piece of evidence on the issue of actual malice. As the district court recognized, "[a] reporter cannot shield himself from a charge of reckless disregard merely by showing that he invested a large amount of time and effort on an article's preparation." 567 F. Supp. at 654. The expenditure of considerable time and effort on a story may be evidence of a reporter's good faith belief in what he writes. It may, on the other hand, merely be evidence of a dogged and thorough attempt to "get" the subject. Its evaluation is a matter for the trier of fact, and what the reporters did and did *not* investigate assume critical importance. When obviously biased sources are involved, obtaining *reliable* corroboration is the name of the game.

The Plaintiffs' Refusal to Cooperate with Interviews. The defendants repeatedly attempted to interview the plaintiffs and Mobil officials. They were repeatedly rebuffed. The defendants correctly point to these attempts as some evidence of their lack of actual malice. But this evidence obviously is not dispositive, for even one who wrote what he knew or suspected to be false may have sought to interview the subject of his story.

Implicit in this argument by the defendant is the apparent belief that plaintiffs should not be heard to complain about a publication when they have refused the opportunity to be interviewed. But individuals cannot be compelled to speak with reporters; their decision to exercise their right to remain silent does not strip them of their remedies for defamatory falsehoods. William Tavoulareas cannot force a newspaper to publish his views. No more can that newspaper force Tavoulareas to speak by holding the sword of defamatory falsehood over his head.[52]

Inclusion of Denials. The defendants also stress that denials by Mobil and Tavoulareas were included in the story. Inclusion of such denials is evidence tending to show the absence of actual malice. The jury and this court on review are entitled to evaluate it. But mere publication of a denial by the defamed subject does not absolve a defendant from liability for publishing knowing or reckless falsehoods. As the Supreme Court of Pennsylvania has noted, "an astonishing number of people are convicted of charges they deny, and the denial does not set them right in the public mind. A denial often leads piquancy to the story, and printing one would be an easy escape from liability, if that were all there was to it." *Morgan v. Bulletin Co.*, 369 Pa. 349, 353, 85 A.2d 869, 872 (1952). *See also Dempsey v. Time, Inc.*, 43 Misc. 2d 754, 252 N.Y.S.2d 186, 189, *aff'd*, 22 A.D.2d 854, 254 N.Y.S.2d 80 (1964); *Cobbs v. Chicago Defender*, 308 Ill. App. 55, 31 N.E.2d 323 (1941).

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[52] In light of Tyler's perceived mischaracterization of statements by Mobil officials in a previous article, *see* note 36 *supra*, the insistence of Mobil officials on giving *written* responses to *written* questions, *which they did*, does not appear to be wholly unreasonable.

10. *Some of Defendants' Suggested Inferences from the Evidence*

From the foregoing analysis we think it is clear that the evidence, together with all inferences favorable to the plaintiffs that can reasonably be drawn therefrom, establishes by clear and convincing proof that the defendants acted in reckless disregard of whether the charges were false or not, *i.e.*, with actual malice. In evaluating the possible inferences to be drawn from the evidence, we have necessarily been required to pass upon their reasonableness. We are not required, though, to evaluate the defendants' inferences and accordingly prove them false. Our review commands only that we evaluate the inferences most favorable to the plaintiff, examine them for their reasonableness, and determine whether they support a finding that the plaintiffs have clearly and convincingly demonstrated actual malice. This we have done.

The dissent nonetheless charges that our review does not consider relevant interpretations of the evidence. *See* Dissent at 31. To the extent the dissent suggests that we should accept or discredit evidentiary inferences advanced by the defendants, we note the following inferences—central to the defendants' case—which the defendants in argument submitted to the jury but which the jury obviously did not believe.

First: that after admitting "we don't know the words back and forth," the defense *suggested* that William Tavoulareas told Comnas "If you want the [Mobil] business, take Peter in with you" (Tr. 4424). This inference is based on no more than mere speculation.

Second: that William Tavoulareas used $100,000 of Mobil funds to "[g]et George Comnas out of Atlas, *because once you have George Comnas out of Atlas, it is there for Peter Tavoulareas to take over with his partner, Ares Emmanuel*" (Tr. 4441) (emphasis added). This is

equivalent to arguing that William Tavoulareas purposely used $100,000 of Mobil funds to force Comnas out of Atlas to permit Peter to "take over." However, *Comnas' shares were offered to Hoffmann, not Peter* (Tr. 4151).

Third: that Tyler's suggestion to Piro, "Hey, maybe we should get somebody to rifle Tavoulareas' safe" was a joke and not a serious suggestion (Tr. 4461). Yet Golden, who was present at The Owl restaurant when Tyler made this suggestion, testified that he believed Tyler was asking Piro "to commit a crime" (Tr. 216).

Fourth: that "the Peterson memorandum adds up to . . . *precisely nothing* in this case" (Tr. 4474) (emphasis added). Suggesting that the jury draw this inference from the Peterson memorandum represents a refusal to otherwise meet this important issue and left the jury free to weigh this evidence in the plaintiff's favor.

Fifth: that defendants also asked the jury to rely on the *credibility* of Comnas and conclude "that Tavoulareas, personally, urged Comnas to take Peter on as a partner" (Tr. 4490). On Comnas' credibility, Tyler and Woodward, particularly Tyler, testified that they did not have to check on George Comnas' credibility because they relied on statements William Tavoulareas and Paul Wolfe had made about Comnas and his career before he went into Atlas. In response, William Tavoulareas testified:

> To use me as a basis for saying Comnas was a man of credibility and competence I think is just unbelievable.
>
> Now, exactly the same situation happens with Paul Wolfe. Paul Wolfe says when we first hired him [Comnas] we thought he was good. We found out he couldn't perform.
>
> And you people yourselves have heard what Paul Wolfe has said. And what about Kousi? What did Kousi say? Kousi said he was bad, he was over his

> head. He increasingly got disillusioned with him and he said *he solicited a bribe on the Japanese deal and he was mixed up in the Italian Exxon scandal.*
>
> Could you read that testimony as saying it's an endorsement? If his other sources are as good as those three sources, I'm amazed.

(Tr. 4152-53) (emphasis added). The foregoing testimony greatly weakens the inferences that can *reasonably* be drawn by the defendants to rebut the plaintiff's case. When the principal reliance for the story was Comnas, the refusal of the defendants to introduce Comnas' deposition left the jury free to discount the truthfulness of the statement.

In sum, on final argument the defense suggested a number of inferences to be drawn from the evidence which the jury obviously did not consider to be *reasonable* in the face of clear and convincing evidence to the contrary. Our review sees no error in that conclusion.

11. *Summary*

In sum, then, the jury clearly could find that the article was both false and defamatory. As to the defendants' state of mind with which they published the story, the jury was faced with the following evidence:

* The story on its face alerted the defendants to the fact that its potential harm to William Tavoulareas' reputation was great.

* The article was not "hot news," and the defendants were under no significant time constraints in publishing it, yet it contained misstatements of fact and law and defamatory implications.

* The defendants were motivated by a plan to "get" the plaintiffs, and deliberately slanted, rejected and ignored evidence contrary to the false premise of the story,

generally resolving ambiguities in the light most damaging to Tavoulareas.

* The *Post* defendants relied on sources of questionable credibility for major portions of the defamatory allegations; and the defendants possessed information which should have alerted them to the credibility problems.

* Tyler's notes of interviews on some points reflect exactly the opposite of what he was told by the interviewees, and in the case of Checket, at least, he cited as a "corroborating" source one who had in fact flatly denied the statement.

* During the editing phase of the article, substantial doubts regarding the accuracy of the article's central theme were voiced by at least one editor (Peterson) who worked on the article; the Peterson memorandum was circulated to Tyler and to the editors directly responsible for the article. There is no claim or any evidence that any effort was made to address those doubts, and no substantial changes were made in response to them.

* The defendants have steadfastly refused to retract their story or even to print the plaintiff's letter in their letters to the editors column.

From our review of the entire record we conclude that the direct and circumstantial evidence, taken as a whole, supports a finding that the plaintiffs have demonstrated, clearly and convincingly, that the falsehoods contained in the article were published not merely through negligence or inadvertence, but with reckless disregard of whether they were false or not, *i.e.*, with actual malice. A judgment n.o.v. was inappropriate.

V. The Verdict Against Piro

Plaintiffs William and Peter Tavoulareas sued defendant Dr. Piro for slander and its foreseeable republication. Piro was charged with making the following

slanderous statements concerning William Tavoulareas: (1) William had arranged for Peter's first job with C.M. Lemos & Co.; (2) William (as President of Mobil) had set up his son Peter as a partner in Atlas Maritime Co.; (3) William had described his interest at the time as "giving Peter a little nudge to get along"; and (4) after the departure of Comnas, William dispatched one of his senior shipping executive to London to help run Atlas. Complaint, *Tavoulareas v. Piro*, Civ. No. 80-2387 (D.D.C. Sept. 19, 1980); J.A. 89, 90.[53] The jury returned verdicts in favor of both plaintiffs. The district court then granted the judgment n.o.v. in favor of Piro against Tavoulareas (although it affirmed the jury verdict for Peter). The court found that although Piro had little or no idea how Atlas and Samarco came about and what role the Tavoulareases played in them, his false and defamatory statements were not uttered with actual malice (J.A. 766-67).[54] From the legal analysis set forth previously, it is apparent that this conclusion with respect to actual malice is incorrect.

Piro's position seems to be that ignorance of truth or falsity, far from amounting to actual malice, actually *negates* such a finding. He claims that he knew little about Atlas and did not comprehend the complexities of the transactions (Brief of Piro at 10), hence his false and defamatory statements were not uttered with actual malice. Thus, he posits that only a *known* falsehood is actionable.

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[53] The falsity and defamatory character of these slanders has been discussed in section III *supra*. Suffice it to say that when these accusations are viewed in their entirety, as they must be, they essentially charge that William had breached his trust to Mobil's shareholders by using Mobil's assets for his son's benefit.

[54] The district court found: "He [Piro] was totally unaware of the financing arrangements for the various companies, and had never heard of Samarco or the Alireza family" (J.A. 767; Tr. 2899-2912).

This position is wholly untenable. The uttering of *reckless* falsehoods may support a finding of actual malice. Uttering defamatory statements with no idea whether they are true or false is *by definition* acting with reckless disregard of truth or falsity. *See Varnish v. Best Medium Publishing Co.*, 405 F.2d 608, 612 (2d Cir. 1968), *cert. denied*, 394 U.S. 987 (1969).[55] Piro's admission that he had little or no knowledge of the Atlas-Samarco-Mobil relationship (Tr. 2899-2928), taken in conjunction with all the circumstantial evidence of his state of mind, entitled the jury to find that he acted with reckless disregard of whether the charges were false or not, and supports our conclusion on review that the jury verdict was based on clear and convincing evidence. Thus, the judgment n.o.v. must be set aside and the jury verdict for William Tavoulareas reinstated against defendant Piro.[56]

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[55] In *Varnish*, the Second Circuit noted that the "[e]vidence of recklessness consist[ed] largely of the author's testimony . . . that he had no basis" for key statements in a defamatory article. 405 F.2d at 612. A jury verdict for the plaintiff was affirmed. In Manale v. City of New Orleans, 673 F.2d 122, 124 (5th Cir. 1982), the court found malice in the fact that the defendant had no basis for asserting that a police officer was a homosexual. (It is not clear from the opinion whether the actual malice test of *New York Times* was applied.)

[56] In reinstating the verdict for William Tavoulareas against defendant Piro, we note an issue not raised by the parties—namely, the issue of "republication liability." William Tavoulareas had sued Dr. Piro not only for slander, but for republication libel as well (the *Post's* printing of the slanders Piro uttered to the *Post* reporters). The jury returned a general verdict in favor of William Tavoulareas. Should the verdict be based in part on a finding of republication libel, it poses no problem on our review. The maker of a slanderous statement may be held accountable for its republication if such republication was reasonably foreseeable. L. Eldredge, The Law of Defamation § 46 (1978); Restatement (Second) of Torts § 576 (1977), *cited in* Ingber v. Ross, 479 A.2d 1256, 1269 (D.C. App. 1984) (dictum). Here, Piro conveyed his slanders to

VI. The Verdict Against Golden

To be liable for defamation, defendant Golden, in addition to the actual malice and falsity requirements, must have *published* or knowingly participated in publishing the defamation. The plaintiffs do not seriously argue that Golden himself took any part in the *actual* writing or editing of the Tavoulareas article, or that he exercised any influence or control over the *Post* defendants' handling of the material. There is, moreover, no evidence that Golden read the article before publication or knew what its final contents would be. While he participated in the investigation, his participation was limited to initially sparking the *Post's* investigation, furnishing such initial information as he had received, conferring with Tyler on the course of the investigation, and supplying one source for the article. He played no role in the actual preparation of the story. Hence, his liability, if any, depends upon whether his participation in the story was significant enough, and was rendered with sufficient knowledge, to make him liable for the *Post* defendants' defamation.

Responsibility for publication is a factual question which is normally for the jury to resolve. *Skeoch v. Ottley*, 377 F.2d 804, 808 (3rd Cir. 1967). It is an infrequent issue in defamation cases, because normally it is fairly clear who wrote, edited, or published the statement in question. The courts of the District of Columbia

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Golden and Tyler, whom he knew to be newspaper reporters. Under the circumstances here it was reasonably foreseeable that as reporters they might republish the statements in a news story. Accordingly, there is no need to require proof that Piro knowingly participated in the *Post's* republication. As our following discussion of the liability of reporter Golden suggests, we distinguish, for purposes of republication liability, between the liability of the maker of the statement and the liability of one who republishes those statements, here to a reporter for possible use in a story that will presumably be investigated further.

have had little occasion to discuss the issue and have not adopted a formal test for determining the quantum of participation in a defamatory article necessary for liability. Yet, whatever that quantum may be, we think the First Amendment precludes its descending to the level of Golden's demonstrated participation in this case.

As our earlier discussion shows, it was available for the jury to find that the elements of information which Golden contributed to the story were so flimsily substantiated that reliance upon them evidenced reckless disregard of whether they were false or not. What made the final publication reckless, however, was not simply use of that information, but also use of that information in the face of *known* substantial contradicting evidence exonerating Tavoulareas, which gave rise to serious doubts about the truthfulness of the story. Since Golden had no editorial authority on the *Post*, it was not his responsibility to know of the contradictory evidence, nor did the testimony establish how much of it, if any, he in fact knew. It cannot be considered "reckless disregard" to gather and bring to a newspaper's attention allegations of wrongdoing made by others (even by incredible witnesses, so long as their statements are not affirmatively known to be false) to form part of a story that is to be investigated in full by the newspaper's large and skilled investigative staff. As far as appears, that was the extent of Golden's participation here. To hold Golden responsible *as a principal* for the *final* publication would have the effect of drying up sources of information, no single one of which may be adequate to support a responsible story.

The same conclusion obtains if we treat Golden's liability as that of an aider or abettor—assuming, without deciding, that such an analysis applies to a tort that is not "intentional" in the strictest meaning of that word, but is based upon "reckless disregard" as defined for purposes of libel law. In our recent decision in *Halber-*

stam v. Welch, 705 F.2d 472, 477 (D.C. Cir. 1983), we set forth the following analysis to be used in civil aiding-abetting cases:

> Aiding-abetting includes the following elements: (1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; [and] (3) the defendant must knowingly and substantially assist the principal violation.

We used a similar approach in *Investors Research Corp. v. SEC*, 628 F.2d 168, 178 (D.C. Cir.), *cert. denied*, 449 U.S. 919 (1980). Without applying all the factors of this analysis, we note immediately that there is no evidence that the second of these factors (the defendant's "aware[ness] of his role as part of an overall illegal or tortious activity") was satisfied with regard to Golden. That is so even if "reckless disregard" is an adequate substitute for "awareness," since, as we have just discussed in connection with Golden's liability as a principal tort-feasor, there is inadequate evidence of reckless disregard on his part as well. There is in this record no evidence that Golden knew of the defects in the *Post's* investigation and of the in-house handling of the additional material that was collected. He never knew what the *Post's* article would say before he read it in the newspaper. There is no evidence that Golden and Tyler talked in advance about what premise or theme the article would take. Because of these insufficiencies of evidence, liability cannot be imposed upon Golden as an aider or abettor. For the foregoing reasons, the judgment n.o.v. entered in his favor by the district court must therefore be affirmed.

VII. Conclusion

Since it is apparent from a review of the entire record that the evidence was sufficient to demonstrate that the

article was published in reckless disregard of its falsity, the judgments n.o.v. entered for Piro and the *Post* defendants are reversed. In our opinion this is a case where the record demonstrates that a properly instructed jury found liability, that clear and convincing evidence supports its verdict so far as liability is concerned, and that it was improper for the trial court to reweigh the jury's findings on credibility and arrive at a judgment n.o.v. The judgment n.o.v. for Golden is affirmed for reasons set forth above.

The jury awarded William Tavoulareas $250,000 in compensatory damages and $1,800,000 in punitive damages against the *Post*. Post trial motions were made by the defendants in the district court, including motions for a new trial and motions to have the amount of compensatory damages reduced and the award of punitive damages set aside, or in the alternative, reduced. These motions were denied without prejudice when the judgments n.o.v. were granted. Those rulings are not before this court, and we have no occasion to pass on them at this time. However, because we reinstate the jury verdict with respect to the *Post* defendants and Dr. Piro, the district court on remand must reconsider these related motions. At this time we express no opinion on the issues raised by these motions.

The case is remanded to the district court for further proceedings not inconsistent with the foregoing opinion.

Judgment accordingly.

APPENDIX

Washington Post, November 30, 1979, Page A-1

MOBIL CHIEF SETS UP SON IN VENTURE

Management Firm Is Used to Operate Oil Company Ships

By Patrick Tyler
Washington Post Staff Writer

Mobil Oil Corp. president William P. Tavoulareas set up his son five years ago as a partner in a London-based shipping management firm that has since done millions of dollars in business operating Mobil-owned ships under exclusive, no-bid contracts.

Tavoulareas' son, Peter, was a 24-year-old shipping clerk in 1974, making $14,000 a year. Today, with the help of Mobil, he owns 45 percent of Atlas Maritime Co., which operates 17 ships worldwide.

Mobil, the second largest oil company, provided Atlas with some of these ships—among them Mobil-owned supertankers—under management agreements that allowed Atlas to go into business with a minimal amount of capital.

Mobil also initially provided Atlas with office space in Mobil's corporate offices in London and loaned Atlas a Mobil shipping vice president when Atlas' own top shipping executive resigned in 1975.

[5] Mobil leased back the ships it provided Atlas, thus creating work for Atlas at a time when the shipping industry was severely depressed.

The leasing was handled through an intermediary company, Samarco, of which Mobil owns 45 percent.

According to one source, Peter Tavoulareas put up no investment capital for his initial 25 percent share of

Atlas. Moreover, the lucrative Mobil contracts, along with other managerial assistance, provided by Mobil, helped make Atlas an overnight success. Peter Tavoulareas, now 30, maintains a highly affluent life style, including a home in one of London's most fashionable districts, a Rolls Royce and a summer home on Long Island.

The creation of Atlas was a marked departure from Mobil's historical practice of managing its own fleet of crude oil tankers through its shipping and transportation division.

Atlas was created to handle the day-to-day management work for Samarco, a complex shipping partnership that Mobil negotiated in 1974. The other partners included a prominent Saudi Arabian merchant family and a member of the Saudi royal family.

[10] Samarco—Saudi Maritime Co.—was set up as a way to share shipping revenues among the partners, but the company existed largely on paper, according to one of its original directors, John D. Kousi.

The complicated transactions between Mobil and Atlas and Samarco are not especially unusual in the intricate world of international oil—except perhaps for the presence of father and son. That relationship is not illegal, but securities law requires that Mobil officials report it fully to their stockholders. Mobil claims it did, but that is in dispute.

Beyond the legal questions, however, the story of Mobil's president and his son offers a rare glimpse into corporate behavior at the top of one of the largest publicly held international oil companies.

The Mobil board of directors was told from the outset about the Atlas arrangement but was assured that company president Tavoulareas was not involved in his son's venture in any way.

Mobil officials did not tell their stockholders about the son's involvement in Atlas until two years later.

[15] After initial press inquiries in the fall of 1976, Mobil board chairman Rawleigh Warner, Jr. disclosed in a special letter to stockholders that Peter Tavoulareas "is one of the principals" of Atlas.

That disclosure prompted an investigation by the Securities and Exchange Commission (SEC) in early 1977, but the inquiry was dropped after confidential sworn testimony was taken from the elder Tavoulareas.

U.S. securities law requires that corporate officials disclose the details of business transactions between companies and relatives of the companies' executives. The law was designed to protect shareholders from business decisions based on favoritism.

In recent days, the SEC has reopened its investigation into the role Mobil's president played in his son's partnership in Atlas.

Mobil chairman Warner says he assured directors in board meetings that Tavoulareas "does not participate in any decisions" relating to Mobil's business with Atlas.

[20] But a source close to the Tavoulareas family and those familiar with the formation of Atlas said Mobil's president was involved personally in several key decisions and actions relating to Atlas, among them:

• Tavoulareas personally recruited two shipping executives, one an outside consultant and the other a Mobil vice president, for Atlas. One of them set up and ran Atlas for more than a year. The other managed it for a time.

• The Mobil president helped negotiate the arrangement whereby the Saudi shipping partnership, Samarco, would turn over all of its management business to Atlas. Mobil officials acknowledged this in a statement last week to The Post.

Panel Majority

• As the formation of Atlas was being planned in April 1974, Tavoulareas personally urged that his son be included as an equity partner in Atlas. However, in the Mobil statement, Tavoulareas denies this. "Mr. Tavoulareas asserts that he did not initiate this arrangement," the statement said.

• The elder Tavoulareas played a personal role in forcing the resignation in 1975 of Greek shipping executive George D. Comnas, who had been recruited a year earlier by Tavoulareas to set up Atlas. The resignation followed several personal disputes between Comnas and Tavoulareas' son. Mobil's statement said "Mr. Tavoulareas played a minor role . . . in the arrangements made when Comnas departed from Atlas. Since it was on Mobil's recommendation—including Mr. Tavoulareas' . . . [that Comnas set up Atlas], it was logical that Mr. Tavoulareas participate."

[25] The elder Tavoulareas was not available for an interview, but through a spokesman acknowledged that the basic idea to set up Atlas was his and that he recommended Comnas set it up. But he denied that he urged that his son be accepted as a partner and stated that he divorced himself from Mobil's business with Atlas after his son joined the company.

Comnas, according to Marquis Who's Who, completed a 30-year career with Exxon in 1968 and was president of Mediterranean and African subsidiaries for Exxon during his last years there. In the five years before he formed Atlas, Comnas, 66, was managing director and chairman of the board of C.M. Lemos & Co. Ltd. of London, reportedly the largest of the Greek shipping firms.

One of Mobil's partners in Samarco said that the involvement of Peter Tavoulareas was accepted without objection because it was assumed that other Atlas managers were competent to run the business.

"Clearly it was a nepotistic act," said Kousi, one of the original directors of Samarco. "At his age [Peter was 24 in 1974] he wasn't a genius, nor was he terribly experienced in shipping. You couldn't expect a lot from someone with that level of experience."

Philip Piro, a Baltimore eye surgeon and former son-in-law to the elder Tavoulareas, who is now estranged from the family, said Tavoulareas expressed his interest at the time as "giving Peter a little nudge to get him along." Tavoulareas, through a spokesman, said he does not recall making the remark.

[30] In 1973, a year before young Tavoulareas became a partner in Atlas, he was making $14,000 a year as a clerk in the London office of Greek shipping magnate Lemos. Sources said that job also was arranged by his father.

Before that, the Mobil president's son was graduated from St. Johns University in New York, where his father sits on the board of trustees, and later received a master's in business administration from Columbia University.

In an early interview, Peter Tavoulareas said that his partnership in Atlas did not represent "overt favoritism" and that his responsibilities in the company revolved around "financing." Peter Tavoulareas said that he was asked by Comnas to join Atlas and was offered an equity interest.

In a later interview, Peter Tavoulareas would not comment further. "I've answered all of the questions you're going to get from me. Atlas has nothing to do with Mobil [in some early editions "Saudis"], it has nothing to do with Samarco and it has nothing to do with the Saudis. Atlas is none of your damn business." He then hung up.

In recent weeks, Mobil has not responded to Washington Post requests for interviews with company officials

familiar with Atlas and its operations. The first such request was made Nov. 8. Mobil's vice president for public affairs, Hebert Schmertz, said Nov. 16. "We're not saying no and we're not saying yes." Still later, Schmertz said the request was "under consideration." In a letter to The Post Nov. 12, another Mobil spokesman, John Flint, said, "We understand that you have been advised that this matter has been examined by several reporters for The Washington Post and New York Times, and apparently they found no basis to do a story."

[35] The Post did make a brief inquiry into Atlas in 1976, but received assurances from Mobil executives that Mobil's president had maintained a completely "hands off" attitude toward Atlas. The Post began a new inquiry two months ago, based on new information about Atlas.

Mobil's Schmertz eventually requested that questions be dictated so that Mobil could respond in writing. This was done and Mobil responded to these questions Nov. 20.

Several sources who agreed to discuss the details of this episode if their identities were protected were intimately familiar either with Mobil's shipping operations or with the attempts by Mobil's president to secure a position for his son in the upper strata of the business world.

The story of international finance, shipping and oil politics begins with the 1973 Arab oil embargo.

In the wake of the oil cutoff, Mobil officials learned that a prominent Saudi merchant company, Haji Abdullah Alireza & Co., was interested in extending Saudi influence from the production of oil to its transportation.

[40] Mobil officials believed at the time that a shipping partnership with the Saudis might yield preferential treatment in the loading of crude oil at Saudi ports.

In his 1976 message to stockholders, Mobil's Warner said, "Samarco was formed in anticipation . . . of [Saudi] flag preference regulations applicable to exports

of petroleum from that country and, also, in anticipation of . . . favorable financing from Saudi Arabian sources."

Mobil and its partners in the venture acknowledge now that neither the preference laws nor the financing for ships materialized.

"The business reasons were wrong, they didn't prove out," says Kousi, whose company sold out its interest in Samarco to Mobil two years ago. "We just didn't see the anticipated benefits," he said.

But at the time Samarco was formed, Mobil officials felt "preference shipping was much more a threat," according to the Mobil statement. Samarco, however, in which Mobil initially held a 30 percent interest and now holds a 45 percent interest, exis'ed mostly on paper. The real work of the partnership would be performed by the management company, Atlas.

[45] "There was no staff or offices for Samarco," said Kousi. "It needed no real offices."

The negotiations between Mobil executives and the Saudi partners in Samarco took all of 1974. After the partnership agreement was struck in December, Mobil issued a brief press release saying, "Samarco has engaged the services of Atlas Maritime . . . to manage the operation of Samarco's fleet."

In its statement last week, Mobil acknowledged that "Atlas was created in anticipation of managing Samarco's business." Atlas was created in July 1974.

Mobil president Tavoulareas, the statement continues, was involved in the "policy aspects of participating in Samarco and the concept of Atlas" during those negotiations.

Mobil's first goal when it entered the talks in January 1974 was to steer the Saudis away from a partnership they had formed with a New York-based shipping con-

cern, Fairfield-Maxwell Ltd. The Saudis had approached Fairfield-Maxwell after Mobil initially rejected the joint venture idea.

[50] "The initial invitation from the Saudis was turned down . . . consistent with our normal policy of providing our own transportation and not permitting preference shipping," Mobil said last week.

But Mobil officials said they subsequently perceived a greater threat from preference shipping. Sources said Mobil then dispatched two negotiators to Jeddah in Saudi Arabia to push Mobil as a partner. One of the negotiators was Mobil's Mideast agent, W. Jack Butler, and the other was the Greek shipping executive, Comnas, who was recruited personally by Tavoulareas to advise Mobil on how to set up an independent shipping concern.

By April, the talks on Samarco had progressed far enough that the management arm of the partnership was being planned by Tavoulareas, who recommended to the partners that Comnas be tapped for the job. Late in April, according to one knowledgable source, Tavoulareas personally urged that his son become a partner in Atlas. Sources said that shortly thereafter, the issue of young Peter's involvement was raised with Mobil chairman Warner, who said he raised the issue with the directors and won their approval.

In its statement, Mobil said, "It was George Comnas who asserted that he would like Peter Tavoulareas and one other associate at Lemos, a major shipping company, to join him in the management of Atlas. Mr. Tavoulareas asserts that he did not initiate this arrangement."

Nevertheless, the other Lemos employe who came to Atlas with young Tavoulareas, an experienced insurance clerk named Ares D. Emmanuel, was given only employe status while Peter Tavoulareas was made a 25 percent partner. Within a year, Tavoulareas would become a 45 percent partner.

Panel Majority

[55] After Atlas became fully operable in late 1974, the time came for Samarco to begin acquiring ships for Atlas to manage. However, contrary to Mobil's hopes when it formed the partnership, the Saudis were unwilling to provide any investment funds or financing for ships.

Mobil said in its statement that an unspecified amount of "capital contribution" was made by each partner when Samarco was formed. One of the partners, the son of Crown Prince Fahd, heir to the Saudi throne, apparently had a special arrangement. Said Mobil: "The prince's share was financed by loan, which he must repay before he receives any financial benefits in the company."

As a result, in early 1975, Mobil provided Samarco's first vessel from its own fleet. The ship, a supertanker, had been launched as the Mobil Mariner, but was renamed the Saudi Glory, presumably to reflect the interests of the Saudi partnership.

The Saudi Glory was turned over to Atlas by Mobil under a "bareboat" lease through Samarco, meaning the structure of the tanker, without crew, fuel or stores, was rented to the Saudi partnership and its management arm. However, because Samarco and Atlas had no funds with which to pay such a rental fee, the ship was leased back to Mobil simultaneously.

Under this arrangement, Atlas agreed to operate the vessel for Mobil, hire crews, arrange for fueling and handle small maintenance chores. All major repairs were Mobil's responsibility. Thus Mobil paid Atlas the cost of operating the ship plus an unspecified margin of profit.

[60] Mobil's executive vice president for Mideast transportation, Paul J. Wolfe, said in an early interview that Atlas' basic management fee was $600,000 a year and included an escalation clause. Other sources said the fee would escalate with the cost-of-living index and also after Atlas acquired more than 10 ships.

Peter Tavoulareas said the management fee was $680,000 for 1976, when Atlas was operating six ships.

The firm's income for subsequent years is not known, but one knowledgeable source said that Atlas was structured so that profits would increase dramatically as more ships were acquired, because overhead costs for staff and office space were relatively fixed.

Because Mobil operates its own ship management arm within the Mobil organization, it could have managed the Samarco fleet itself, company officials acknowledged.

But Mobil officials claim that there could have been a conflict of interest for any one of the Samarco partners to manage the ships owned by all of the partners. Mobil's statement said:

[65] "Mobil did not want to manage Samarco or to set up a Samarco management company, as there could be a conflict of interest between Mobil and Samarco when chartering ships in or out for either company. Neither of the Saudi partners had experience to qualify them to manage. Fairfield-Maxwell could have had a similar conflict. Accordingly, it was prudent to have an independent third-party managing company."

Mobil officials said a study was done of management fees in the shipping industry as a guide to setting Atlas' fees. But the company acknowledged that there were no bids.

"Ship management arrangements are difficult to assess on a bid basis . . . From Mobil's experience, the overriding selection criteria for such operations is the prospect of good, safe performance and access to low-cost dependable crews," the company's statement said.

(Atlas has lost one ship, the Atlas Titan, which exploded and burned last May at Setubal, Portugal, during a tank-cleaning operation, according to Lloyd's of London. The ship was sold for scrap in July.)

Panel Majority

Acording to Mobil's statement, one advantage derived from using Atlas as a management company came from Atlas' "ability to use low-cost Greek crews unavailable to Mobil or to other, similar non-Greek companies."

[70] Kousi, Mobil's partner at the time, reacted to that statement by saying, "Who didn't [have access to low-cost Greek crews]? That's a phony argument." Kousi said that virtually all companies who have international subsidiaries, such as Mobil, have access to low-cost crews of Greek and other nationalities.

It is not clear from maritime records how many ships Mobil supplied to Atlas under the contract arrangement. The records show that in March 1978, Mobil was the registered owner of an oil tanker named the Yanbu that was under Atlas' control. And, last October, Mobil supplied to Atlas another tanker named the Solon, records show.

The second of the ships that were turned over to Atlas in 1975 was also a Mobil ship. The 250,000-ton supertanker, launched as the Mobil Supplier, according to Federal Maritime Commission records, was renamed the Al Haramain.

The third ship, also Mobil's, was launched as the Elena and became the Al Rowdah.

Presently, Mobil officials said in their statement that they have chartered "certain tankers" to Samarco "and chartered most of these back from Samarco on a time charter basis."

[75] Of the 17 ships Atlas reportedly operates worldwide, Mobil said seven are run for Samarco and four of those ships are owned by Mobil.

Less than a year after this corporation was set up to manage the fleet assembled by Mobil with the Saudis, Atlas underwent an internal struggle in which Peter

Tavoulareas and one of his employes, Emmanuel, took over control of the company.

Comnas, who had been recruited by Mobil to set up Atlas and run it, resigned in mid-1975. Mobil's Wolfe explained the Greek shipping executive's departure by saying that Samarco's directors had grown dissatisfied with his performance.

Kousi, who was on the Samarco board at the time, declined to discuss Comnas' departure in detail. He did say that it was not Samarco's board that was dissatisfied, but rather, "Mobil basically was dissatisfied."

Sources familiar with the situation said that Peter Tavoulareas had several personal disputes with Comnas and shortly thereafter, his father, William Tavoulareas, intervened. Mobil acknowledged that Tavoulareas played a minor role by "assuring a settlement that was fair and equitable to both parties."

[80] That settlement reportedly included Mobil paying Comnas a substantial retainer as an independent marine consultant for several years.

The relationship between the Mobil president and Atlas also was exemplified by his response when Atlas was left without a seasoned shipping executive in control after Comnas departed.

Almost immediately, according to Piro and other sources, the elder Tavoulareas dispatched one of his senior shipping executives, Herman F. Hoffmann, to London to help run Atlas.

Said Kousi: "Mobil had suggested Comnas so it was natural for Mobil to step forward and to feel an obligation to meet whatever vacuum they thought existed."

Mobil gave this account in its statement: "Since Mobil had originally recommended G. Comnas to Samarco, we felt an obligation to Samarco to maintain quality man-

agement of their operations. We made Hoffmann . . . available as an interim manager of Atlas."

[85] During this period, Hoffmann was given the opportunity to take over Atlas permanently, but he declined. While he remained at Atlas, Mobil officials said, Hoffmann's salary "was pro-rated in proportion to his time. Atlas reimbursed Mobil for that portion relating to Atlas duties, plus all related expenses."

Special correspondent Sandy Golden contributed to this report.

WRIGHT, *Circuit Judge, concurring in part and dissenting in part*:

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Panel Dissent

"[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open * * *." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). In my judgment, the majority opinion strays far from this fundamental commitment, vastly increases journalistic liability, and mistakenly rejects the carefully reasoned opinion of Judge Gasch. I dissent from almost all of the majority opinion; I concur only in the judgment affirming the judgment notwithstanding the verdict for defendant Golden.

I. BACKGROUND

It is helpful to review the salient facts that are not in dispute. In 1974 Mobil became a substantial partner with prominent Saudis and another company in a joint venture called SAMARCO, a shipping concern. William Tavoulareas, Mobil's president and the advocate of close cooperation with the Saudis, played a major role in conceiving and preparing Mobil's participation in SAMARCO. Mobil and its partners agreed that Atlas Trading Company, which had been formed, according to Mobil, "in anticipation of managing SAMARCO's business," Record Excerpts (RE) 2344, would manage SAMARCO's ships; many of those ships would be leased from Mobil. In the spring of 1974 William Tavoulareas personally recruited George Comnas to manage SAMARCO's ships through Atlas. At the time Tavoulareas knew that his son, Peter, worked for Comnas. Soon after Comnas took control at Atlas, Peter left his $14,000 a year job to become a major partner at Atlas. All of these facts are undisputed.

After researching the story for a month, *Washington Post* reporter Patrick Tyler wrote an 85-paragraph article about the Mobil-SAMARCO-Atlas relationship and Tavoulareas' role in it. More than 20 paragraphs of the article reported Mobil's version of the events in question. Tavoulareas challenges three statements and one implica-

tion in the article: the statement that he "set up" his son and "personally urged" his inclusion as a partner, the statement that he "personally dispatched" an executive to Atlas after Comnas' departure, the statement that Mobil "provided" ships to Atlas, and the possible implication that Tavoulareas engineered the transaction solely to benefit his son.

Assuming that Tavoulareas is a public figure, *see* discussion in text at 40-46 *infra*, the question before this court is whether these statements and the claimed implication are stripped of their First Amendment protection because they were false, defamatory, and published with knowledge or reckless disregard of their falsity. Since I find that the evidence in the record falls far short of establishing clear and convincing proof of knowledge or reckless disregard of falsity, I view that question as dispositive. For, even if the statements are false and defamatory, without such clear and convincing proof of knowledge or recklessness, the First Amendment unquestionably protects the challenged expression.

II. Legal Standard

A. *Overview*

The majority opinion achieves no less than an ambitious, wide-ranging revision of libel jurisprudence. The majority accomplishes this revision in two ways. First, it counts, as elements of actual malice, factors that are completely impermissible considerations in reaching the daunting conclusion that the First Amendment does not apply to the challenged expression. These factors include criticism of a newspaper's emphasis on attention-getting stories, majority opinion (maj. op.) at 52-54; condemnation of the career ambitions of young journalists, *id.* at 50-52; challenges to a newspaper's resolution of reasonable ambiguities, *id.* at 54-57; and rejection of editorial judgments about the information to be included in an

article that clearly reports both sides of a disputed story, *id.* at 57-62. Indeed, the majority appears to criticize what it takes to be the general climate in journalism today. It goes so far as to attach some opprobrium to a newspaper's policy of " 'hard-hitting investigative journalism,' " maj. op. at 53, and, too, emphasizes the need to deter "the least responsible journalists" who might "scoop their more careful colleagues." *Id.* at 75 n.50.

In my judgment, we do not sit, even in reviewing a libel verdict, as some kind of journalism review seminar, offering our observations on contemporary journalism and journalists. Our mission is to see that the First Amendment is vigorously protected and that libel verdicts not supported by clear and convincing evidence do not stand. The majority's use of these impermissible factors as evidence of actual malice seriously undermines that mission. The majority stresses that we should suspend judgment on each of its factors because, after all, " 'a brick is not a wall.' " Maj. op. at 56 (citation omitted). But when a particular factor is so insubstantial and so inappropriate to the weighty First Amendment matters before us, it clearly is not even a brick.

Second, the majority dramatically narrows our well-established constitutional responsibility to conduct an independent review of the record in these First Amendment cases. The nature of that review is critically important, and the majority seeks to reduce it to a pro forma, mechanical ratification to be undertaken only after the pieces of evidence have already been uncritically labelled "indicia of actual malice" and "cumulated." The majority's determined effort to constrict our constitutionally mandated inquiry will be discussed in detail below.

Through these two devices, the majority manages to reinstitute a jury verdict of libel in this case. In a brief aside at the last moment, the majority dangles the possibility that this excessive $2.05 million verdict may

ultimately be reduced in further proceedings. Maj. op. at 88. And that is at least some comfort, given that these damages seem clearly disproportionate to any possible rendering of the *Post*'s conduct and Tavoulareas' injury. But it is, of course, the libel verdict itself, not merely the amount of damages, that chills First Amendment expression. Indeed, a majority of this court recently recognized that a libel suit itself has the potential to chill. *See Ollman v. Evans*, 750 F.2d 970, 991 n.44 (D.C. Cir. 1984) (*en banc*); *id.* at 993 (Bork, J., concurring). And in a statement that aptly summarizes the problems with the majority's approach in this case, three members of the *Ollman* court joined Judge Bork's statement that "[i]t is not merely the size of damage awards but an entire shift in the application of libel laws that raises problems for press freedom." *Id.* at 996-997. In short, our central inquiry is whether there is clear and convincing evidence of reckless falsity; the possibility of reduced damages does not remedy the problems in the majority's decision, or the distortion that it works on our constitutionally mandated independent inquiry.

This is not a case that lends itself to easy capsulization. The record—which we are constitutionally charged to review—includes some nine volumes and 3400 pages in the Joint Appendix submitted to us, and that appendix contains only record excerpts. The issues are many and varied, touching on countless subdoctrines in the often baroque field of libel jurisprudence. But despite the vastness of the record and the number and complexity of the issues, our responsibility is fundamental, all-important, and inescapable: we must determine whether the First Amendment protects the challenged expression.

To discharge this responsibility, it is necessary for the court—and this dissent—to examine the varied issues and the complex record with extreme care. With respect to the majority's use of impermissible factors, I will discuss

each impermissible factor in turn as part of a systematic analysis of the elements that, in the majority's view, are sufficient to reinstate the verdicts. However, the nature of the independent review that is our constitutional responsibility—and that the majority transforms into a pale imitation of its former self—must be considered in detail at the outset.

B. *The Constitutional Responsibility of Independent Review*

In *Bose Corp. v. Consumers Union of United States, Inc.*, —— U.S. ——, 104 S.Ct. 1949 (1984) (hereinafter cited only to 104 S.Ct.), the Supreme Court vigorously reaffirmed the *New York Times* requirement of independent appellate review for determinations of actual malice. The Court stated unequivocally, "Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'" *Id.* at 1965. Specifically, the Court noted that this responsibility extends to "an independent assessment * * * of the evidence germane to the actual malice determination." *Id.* at 1967 n.31.

This case concerns the exercise of that independent review in considering a challenge to a trial judge's decision to grant a j.n.o.v. In the majority's rendering, our review in this situation becomes a process in which we resolve all inferences in favor of the plaintiff, reject conflicting evidence supporting the defendant, reflexively label inferences "indicia of actual malice," "cumulate" these malice-laden inferences, and then ask whether actual malice has been clearly and convincingly established. In my judgment, this approach assumes its conclusion, narrowly cabins our review, and deprives the media of the protection that *New York Times* and *Bose* sought to confer—

a vigorous judicial review to ensure that verdicts based on less than clear and convincing evidence of actual malice will not stand. It thus reduces the safeguards for the "journalistic independence" that this court has stressed. *McBride v. Merrell Dow & Pharmaceuticals, Inc.*, 717 F.2d 1460, 1466 (D.C. Cir. 1983).[1]

According to the majority, *New York Times* and *Bose* create some kind of distinction between the "manner" and "standard" of evaluating evidence. This distinction, articulated in two Ninth Circuit decisions, is, of course, nowhere to be found in the Supreme Court's frequent admonitions to "make an independent examination of the whole record," *see, e.g., Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 282 (1972). Since the majority seeks to enthrone it as the law of the circuit, however, the distinction bears some attention.

In the majority's view, " '[t]he *standard* against which the evidence must be examined is that of *New York Times* and its progeny. But the *manner* in which the evidence is to be examined in the light of that standard is the same' " as in all other challenges to j.n.o.v. determinations. Maj. op. at 20 (*quoting Guam Federation of Teachers, Local 1581 v. Ysrael*, 492 F.2d 438, 441 (9th Cir.), *cert. denied*, 441 U.S. 962 (1974) (emphasis by the *Guam* court)). Thus the majority concludes that "the evidence and the reasonable inferences derived from it"

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[1] The majority's conclusions on the use of summary judgment in First Amendment cases, maj. op. at 18, represent dicta extraneous to the appeal before us. I note only that the majority's interpretation may well conflict with the clear law of this circuit, *see McBride v. Merrell Dow & Pharmaceuticals, Inc.*, 717 F.2d 1460, 1467 (D.C. Cir. 1983); *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967), but that question is for another day when the issue emerges in the case before the court.

should be "examined in the light most favorable to the plaintiffs," *id.* at 21, and that the j.n.o.v. posture of the case requires that "all reasonable inferences must be granted to the plaintiff." *Id.* at 26. Critically, this presumption in granting inferences even applies to inferences that the majority has determined are "indicia of actual malice"—reliance on unreliable sources, resolution of ambiguities against the plaintiff, and so forth. These inferences are then "cumulated." Only *after* these inferences have been granted in favor of the plaintiff and cumulated, the majority reasons, does the *New York Times/Bose* responsibility of independent review come into play, and the question is whether these cumulated inferences prove actual malice by clear and convincing evidence.

This approach renders the independent appellate review promised by *Bose* a mirage. Independent review of the record devolves into review of the pool of pre-selected inferences that cut against the defendant. It comes as no surprise, then, that, at the point for the majority's exercise of independent review, the outcome has already been largely decided against the defendant. This is far from the independent review envisioned by *Bose* "to preserve the precious liberties established and ordained by the Constitution." 104 S.Ct. at 1965.

The majority's method of analyzing the evidence and permissible inferences conflicts with Supreme Court decisions requiring an independent review of the record. In *Bose* itself the decision turned on the inference to be drawn from the finding that a witness was not telling the truth in failing to understand the difference between two phrases: the Supreme Court rejected the inference, drawn by the trier of fact, that the witness recognized the difference at the time of publication, and the Court drew its own inference that the testimony was part of the witness' "capacity for rationalization." 104 S.Ct. at

1966. As the majority notes, maj. op. at 24, the *Bose* Court relied on the "purely factual findings" of the trial judge, 104 S.Ct. at 1967; as the majority fails to note, the Court rejected, as part of its independent inquiry, an inference drawn by the trial judge that was freighted with actual malice implications.

Bose was far from the first case in which the Court emphasized that the constitutional responsibility of independent review encompasses far more than the majority's exercise in ritualistic inference granting. In *Time v. Pape*, 401 U.S. 279 (1971), the Court drew its own inference about the character of a government report described by the defendant. *Id.* at 286-290. Though reviewing a directed verdict—which has the same standard as a j.n.o.v., *Vander Zee v. Karabatsos*, 589 F.2d 723, 726 (D.C. Cir. 1978)—the Court never suggested that its independent review of the evidence in the record should be structured by automatic resolution of malice-laden inferences against the moving party. In its independent evaluation of actual malice determinations, moreover, the Supreme Court has repeatedly stressed that its review is "an independent examination of the record *as a whole*," *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82 (1967) (emphasis added), not merely the bits and pieces which support "indicia of actual malice." Finally, in other constitutional areas in which the Supreme Court has exercised independent review the Court has not undertaken the kind of selective reading of the record and automatic inference assumption that the majority employs.[2]

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[2] *See, e.g., Cox v. Louisiana*, 379 U.S. 536, 546-548 & n.7 (1965) (review of record leads Court to independent inferences about ambiguous events); *Haynes v. Washington*, 373 U.S. 503, 515-516 (1963) ("we cannot avoid our responsibilities by permitting ourselves to be 'completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding' ") (*quoting Stein v. New York*, 346 U.S. 156, 181

Nor has the Court relied on a purported distinction between the "manner" and "standard" of evaluating evidence in reviewing the record. In *Bose* the question before the Court was the very similar question of whether Fed. R. Civ. P. 52(a)—which provides that findings of the trial court[3] may only be set aside if "clearly errone-

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(1953)); *Moore v. Michigan*, 355 U.S. 155, 164 (1957) (review of record leads to different "inference of fact"); *Pierre v. Louisiana*, 306 U.S. 354, 358 (1939) (in race discrimination cases Court has "solemn duty to make independent inquiry and determination of the disputed facts"); *Herndon v. Lowry*, 301 U.S. 242, 249 (1937) (Court rejects "inference" that might save trial court verdict); *Norris v. Alabama*, 294 U.S. 587, 590 (1935) ("whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured"); *Fiske v. Kansas*, 274 U.S. 380, 385-386 (1927) (Court reaches own "inference" about IWW preamble; Court must review state fact-finding "where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts").

That many of these decisions arose in review of state court decisions is irrelevant to the principles of appellate review they enunciate: "surely it would pervert the concept of federalism for this Court to lay claim to a broader power of review over state court judgments than it exercises in reviewing the judgments of intermediate federal courts." *Bose Corp. v. Consumers Union of United States, Inc.*, 104 S.Ct. 1949, 1959 (1984).

[3] In *Bose* the Court rejected the notion that a different standard might apply to a jury trial. 104 S.Ct. at 1964 n.27. Notably, two of the three *Bose* dissenters emphasized that their dissent was from the Court's conclusion about a *bench* trial. They conceded that a *jury* verdict of actual malice—as in the instant case—would compel independent appellate review. *See id.* at 1969 n.2 (Rehnquist, J., dissenting) ("The fact-finding process engaged in by a jury rendering a general verdict is much less evident to the naked eye and thus more

ous"—governed a determination of actual malice. The Court did not turn to some manner/standard distinction. Rather, in emphasizing the differences between questions of fact and questions of mixed fact and law the *Bose* Court emphasized the delicate judgments involved and the necessity of giving a narrow reading to the realm of pure fact in certain circumstances. "Where the line [between fact and law] is drawn varies according to the nature of the substantive law at issue. Regarding certain largely factual questions in some areas of the law, the stakes—in terms of impact on future cases and future conduct—are too great to entrust them finally to the judgment of the trier of fact." 104 S.Ct. at 1960 n.17.[4] Instead of relying on a supposed distinction between the manner and standard of evaluating evidence, the Court framed the judicial responsibility more forthrightly—"an independent assessment * * * of the evidence germane to the actual malice determination." *Id.* at 1967 n.31.[5]

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suspect than the fact-finding process engaged in by a trial judge who makes written findings * * *.").

Appellant's argument that the j.n.o.v. violates the Seventh Amendment is meritless. The constitutionality of j.n.o.v. determinations has long been settled. *See Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 322 (1967); *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 660 (1935).

[4] *Bose* repeatedly stressed the wide berth that must be accorded the actual malice inquiry in drawing the line between fact and mixed questions of fact and law. The Court emphasized that libel, like fighting words, incitement, obscenity, and child pornography, is an area in which "the limits of the unprotected category, as well as the unprotected character of particular communications, have been determined by the judicial evaluation of special facts that have been deemed to be of constitutional significance." 104 S.Ct. at 1962. *See also id.* at 1964 n.27 (" 'the simple fact is that First Amendment questions of "constitutional fact" compel this Court's *de novo* review' ") (*quoting Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 54 (1971) (Brennan, J., plurality opinion)).

[5] In contrast to the apparent ease of the majority's distinction between the "manner" and "standard" of evaluating evi-

Similarly, the majority's emphasis on some great divide between "each separate fact determination that forms the basis for the ultimate conclusion of 'actual malice'" and "the ultimate conclusion of clear and convincing proof of 'actual malice,'" maj. op. at 23, also distorts *Bose*. The majority's central contention is that the *Bose* emphasis on the difference between the scope of Rule 52(a) and the scope of our independent, constitutional review corresponds to the majority's own distinction between "preliminary factual determinations" and "ultimate" facts. Maj. op. at 25. But that is simply not how *Bose* delineates the difference between Rule 52(a) (which applies to factual questions) and our independent review (which applies to constitutionally mixed questions of fact and law). The Court emphasized that Rule 52(a) applies to the "many findings of fact [in a libel case] *that are irrelevant* to the constitutional standard of *New York Times v. Sullivan*," 104 S.Ct. at 1967 n.31 (emphasis added). Our independent review, in contrast, extends to "the evidence germane to the actual malice determination." *Id.* Clearly, the inferences labelled "indicia of actual malice" are *relevant* and *germane* to the constitutional inquiry; indeed, they are essential to it. Thus they are appropriately within the scope of our independent appellate review, rather than within the scope of Rule 52(a). Far from "vest[ing] appellate courts with original jurisdiction in libel actions," maj. op. at 26, that Supreme Court-identified "rational stopping point," *id.*,

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dence, the *Bose* Court recognized the "vexing nature" of the necessary distinction between questions of fact and mixed questions of fact and law. 104 S.Ct. at 1960. *See also Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) (commenting on the absence of "any * * * rule or principle that will unerringly distinguish a factual finding from a legal conclusion"); *Baumgartner v. United States*, 322 U.S. 665, 671 (1944) (observing that the "recognized scope of appellate review is usually differentiated from review of ordinary questions of fact by being called review of a question of law, but that is often not an illuminating test and is never self-executing").

ensures that we may discharge our constitutional responsibility and see that the decision not to extend the First Amendment to challenged expression is limited, in these cases, to those instances in which there is *clear* and *convincing* evidence supporting the verdict.

I believe that the *Bose* Court meant what it said, and that we must undertake an independent assessment of the evidence germane to the actual malice determination —not merely a ratification of the preselected inferences supporting an actual malice conclusion. To be sure, we must recognize that "the presumption that attaches to factual findings is stronger in some cases than in others." 104 S.Ct. at 1959. Credibility of a witness may be the most compelling case for deferring to the factfinder; applying inferences that are labelled "indicia of actual malice," however, may be the least, for it directly affects the independent assessment of the evidence germane to actual malice that *Bose* requires.

In my judgment, Judge Gasch's well-reasoned opinion, *see Tavoulareas v. Washington Post Co.*, 567 F.Supp. 651 (D. D.C. 1983), decided before *Bose*, is far closer to *Bose*'s conception of independent review and sensitivity to First Amendment values than the majority's opinion.[6] For it seems clear to me that if evidence in the record is to be considered probative of actual malice, the judge must answer two questions. First, can this be the type of evidence which the Supreme Court has found may be probative of actual malice? Second, if so, does the evidence *in this case* contribute to a finding of knowledge of

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[6] Despite the majority's assertion to the contrary, I do not assume that the District Court's conclusions and findings "somehow control our review." Maj. op. at 28 n.19. The references to Judge Gasch's conclusions and findings are, of course, references to them as *findings of law*. Unquestionably, we undertake an independent review, just as Judge Gasch did. The references to Judge Gasch's analysis are useful only because of the logic, force, and acuity of his insights.

falsity or reckless disregard of truth or falsity? Failing to address these two questions seems to me to shirk this court's responsibility to undertake an independent examination and assessment of the record.[7]

With these principles in mind, and without the blinders of automatic assumption of malice-laden inferences and their consequent cumulation, I review the evidence in the record to determine if it contains clear and convincing evidence of actual malice.

III. Actual Malice

As noted, our constitutional responsibility requires a careful evaluation of "the evidence germane to actual malice." *Bose, supra,* 104 S.Ct. at 1967 n.31. In this case, and in view of the majority's opinion, that obligation requires an unusually extended discussion. Nonetheless, an independent examination of the record reveals that most of the factors cited by the majority fail to raise even a substantial question about knowledge of falsity or reckless disregard of truth or falsity. Two factors do pose a more substantial question—the Peterson

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[7] Even if *Bose* did not impose a special responsibility of independent review in this case, I might find that the majority's approach violates long-standing principles for construing and evaluating inferences. "Inference is capable of bridging many gaps," *Galloway v. United States,* 319 U.S. 372, 386 (1943), but the inference must be reasonable and supported in the record. *Id. See also Bechtel v. United States,* 101 U.S. (11 Otto) 597, 600 (1879) ("It would be a long stride in dialectics, and one we are not prepared to take, from this fact to the inference * * *."). In relying on inference "[s]peculation cannot take over where the proofs fail." *In Re Sawyer,* 360 U.S. 622, 628 (1959) (Brennan, J., plurality opinion). In "cumulating" inferences, moreover, a court should be especially vigilant in determining whether the inferences are supported by the record. *Cf. People v. Galbo,* 218 N.Y. 283, 294 (1916) (Cardozo, J.) ("We may multiply inferences at times, but, in multiplying them, we must not refine and rarefy them beyond measure.").

memorandum and the reliability of sources. Even those factors, however, do not, in my mind, rise to the level of clear and convincing evidence of knowledge of falsity, or reckless disregard of truth or falsity.

Before considering the lengthy list of factors that comprises the majority's actual malice analysis, it is helpful to focus on the statements that are the putative basis for Tavoulareas' lawsuit and the $2.05 million verdict, and on the materials that were before the *Post* defendants at the time of the article. For the majority's list of factors is only relevant insofar as it contributes to an understanding of whether the defendants published those statements with knowledge or reckless disregard of their falsity.

A. *The Challenged Statements*

For each of the three statements and the implication that Tavoulareas challenges, I will briefly review the statement and the *Post*'s supporting materials.[8] This relationship, never adequately explored by the majority, is an important backdrop for the majority's wide-ranging conclusions about the reportage at issue. The ultimate question for purposes of this actual malice analysis, it should be remembered, is the *Post* defendants' state of mind in reviewing this material—the degree to which the defendants acted with knowledge or reckless disregard of falsity—not the accuracy of the statements themselves.[9]

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[8] As the majority notes, Tavoulareas also points to securities law allusions as false and defamatory, but, since those allusions were not specifically pleaded, they are not before the court as possibly libellous statements. *See* maj. op. at 66; *see also* note 16 *infra*.

[9] The majority, of course, necessarily discusses and decides falsity as well as actual malice. In doing so, it "assume[s] without deciding" that falsity, like the other elements of the constitutional inquiry, must be shown by clear and convincing proof. Maj. op. at 33. The majority's reticence is puz-

1. *Tavoulareas "set up" his son and "personally urged" his inclusion in Atlas.* Tavoulareas challenges two descriptions of his role in establishing the Mobil-SAMARCO-Atlas relationship: in the headline and the first paragraph the *Post* reported that Tavoulareas "set up his son"; in the 23rd and 52nd paragraphs it reported that Tavoulareas "personally urged" his son's inclusion as a partner in Atlas.

In support of the first characterization Tyler and the *Post* had various information before them at the time of publication. As Judge Gasch observed, "[W]hile [Tavoulareas] may contest the ultimate truth of some of this information, he does not dispute the fact that Tyler had this material in his possession at the time he wrote the story." 567 F.Supp. at 659.[10] Tyler had obtained a copy of Tavoulareas' 1977 SEC testimony in which Tavoulareas testified (1) that, in early 1974, he knew that his son worked as an assistant to George Comnas, (2) that he played a major role in the creation of Mobil's role in SAMARCO, (3) that he went to London in the spring of 1974 to interest Comnas in managing SAMARCO's ships through Atlas, and (4) that his son soon became a major partner in Atlas. RE 2051-2053, 2398-2460. Judge Gasch was so impressed with the significance of this information that he concluded, "[Tavoulareas'] own 1977 SEC testimony provided Tyler with a sufficient basis for this allegation." 567 F.Supp. at 659. In addition to the SEC testimony, former SAMARCO director John Kousi, whose credibility is not in dispute, told Tyler that the hiring of Peter Tavoulareas was "clearly a nepotistic

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zling. Like actual malice, falsity must be shown by clear and convincing evidence. *See* Franklin & Bussell, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 864 (1984).

[10] I emphasize again that Judge Gasch's opinion is instructive, not because of a legal principle of deference, but because of its analytical insight and clarity. *See* note 6 *supra*.

act." RE 1163-1166, 1237, 1927-1928. Mobil executive vice president Paul Wolfe also confirmed in response to Tyler's questions that Tavoulareas was involved in planning SAMARCO and Atlas and in recruiting Comnas. RE 2344-2345. Finally, George Comnas, whose credibility is fiercely disputed, told Tyler that Tavoulareas asked him to bring Peter Tavoulareas into Atlas and that Tavoulareas later asked him to resign in return for a consultant's position with Mobil. RE 981, 989.

In support of the second characterization Tyler had Comnas' statement and the contextual corroboration provided by Tavoulareas, Kousi, and Wolfe about Tavoulareas' deep involvement in the formation of the Mobil-SAMARCO-Atlas relationship, as well as his personal recruitment of Comnas at a time when he knew Comnas was in business with his son. The Tavoulareas SEC testimony and the Wolfe letter did deny that Tavoulareas personally urged Peter's inclusion; the *Post* reported this denial four times, including both points at which the "personally urged" statement was made. ¶¶ 23, 25, 32, 53.

2. *Tavoulareas "dispatched" Hoffmann to run Atlas.* In the 82nd paragraph the *Post* reported that, after Comnas' departure from Atlas, "the elder Tavoulareas dispatched one of his senior shipping executives, Herman F. Hoffmann to London to help run Atlas." As Judge Gasch found, Tavoulareas "apparently participated to some extent in the discussion that led to Hoffmann's temporary assignment at Atlas." 567 F.Supp. at 661. Mobil had informed Tyler of this participation. Wolfe wrote that Tavoulareas personally negotiated the settlement for Comnas' departure, that Tavoulareas played a role, which Wolfe described as "minor," in the arrangements after Comnas' departure, and that an unspecified "[w]e" sent Hoffmann to Atlas. RE 2345. In its discussion of the "dispatched" statement as part of its list of factors, the majority dismisses this evidence. *See* text at 31-33 *infra*.

In addition to the Wolfe letter, Tyler had Piro's comments and his own version of the Checket conversation, the credibility of both of which is vigorously disputed.

3. *Mobil "provided" ships to Atlas.* Tavoulareas claims that the *Post*'s reference to ships "provided" by Mobil to Atlas was published with reckless disregard or knowledge of its falsity. His objection is apparently rooted in the view that use of the word "provided" suggested a direct relationship between Mobil and Atlas instead of the actual relationship—that Mobil bareboat-chartered vessels to SAMARCO and time-chartered them back and that Atlas managed the vessels. However, the *Post* article did describe the full, complex transaction. ¶¶ 6, 58-59, 74. Furthermore, Kousi had emphasized to Tyler that control of ships effectively passed from Mobil to Atlas. RE 1940. Finally, Wolfe wrote that "Atlas was created in anticipation of managing SAMARCO's business" and that Mobil beneficially owned four of the seven ships operated by Atlas on behalf of SAMARCO. RE 2344-2346.

4. *The implication that Tavoulareas engineered the entire Mobil-SAMARCO-Atlas arrangement for the benefit of his son.* Tavoulareas also argues that "the article's primary implication was * * * that plaintiff misused Mobil assets by engineering the entire Mobil-Samarco-Atlas arrangement for the benefit of his son." Brief for appellant at 25-26. Judge Gasch rejected this contention because "[t]he article * * * did not say that William Tavoulareas put together the Mobil-Atlas-Samarco arrangement solely for the sake of his son. * * * [T]he article specifically stated * * * that Samarco and Atlas were created for certain political and economic reasons. The nepotism discussed in the article clearly had its origin in a legitimate business opportunity." 567 F.Supp. at 660 (footnote omitted). It is undisputed that the article reported Mobil's business reasons for entering into the SAMARCO-Atlas relationship—its belief that "a ship-

ping partnership with the Saudis might yield preferential treatment * * * [and] 'favorable financing from Saudi Arabian sources.'" ¶¶ 40-41 (*quoting* 1976 Mobil message to stockholders).

These, then, are the statements and supporting materials that form the core of the $2.05 million verdict and the majority's determination that the First Amendment does not protect the *Post*'s article.

B. *Factors Lacking Any Probative Weight*

With these challenged statements and their supporting materials in mind, we can turn to the numerous factors that constitute the majority's actual malice analysis. Most of the factors cited by the majority completely lack probative weight for a finding of knowledge or reckless disregard of falsity. These insubstantial factors include the majority's comments about the defendants' motivation, the defendants' editorial process (the claimed omission of information and resolution of ambiguities), the disputed Checket conversation, and sundry "other indicia of actual malice" (the defendants' refusal to retract, the lack of deadline pressure, and the knowledge of harm).

It is important to consider these factors in detail, for they are so insubstantial and inappropriate that they should not receive any weight. The time and effort required to analyze them, by the majority and by this dissent, should not give them a weight that they lack on their merits. These factors simply fail to amount to bricks for the wall that the majority seeks to build.

1. *Defendants' motivation.* The majority recognizes that "common law malice is not the equivalent of actual malice in the defamation context," but argues that "the presence of common law malice or evidence that a newspaper followed a sensationalistic policy, because it provides a *motive* for knowing or reckless falsehood, is *evidence* of actual malice." Maj. op. at 45 (emphasis in

original). The majority elaborates that a journalistic policy of "'hard hitting investigative journalism,' or * * * 'sophisticated muckraking,' * * * certainly is relevant to the inquiry of whether a newspaper's employees acted in reckless disregard of whether a statement is false or not." Maj. op. at 53-54.

The notion that a policy of muckraking and hard-hitting investigative journalism is somehow evidence of actual malice is deeply troubling, contrary to the nation's tradition of a free and aggressive press, and entirely unsupported by precedent. I will address this startling revision of the actual malice notion in connection with the majority's use of it in its analysis of the *Post*.

A more fundamental problem, however, is whether ill will may be considered evidence of actual malice. The Supreme Court has emphasized that relying on the ill will of the speaker to establish actual malice in a libel case has a chilling effect on vibrant discussion in a free society. "Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth." *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964). *See also Greenbelt Cooperative Publishing Ass'n*, 398 U.S. 6, 10-11 (1970) (same). On numerous occasions the Supreme Court has also emphasized that "ill will toward the plaintiff, or bad motives, are not elements of the *New York Times* standard," *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52 n.18 (1971) (Brennan, J., plurality opinion); *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, *supra*, 418 U.S. at 281, and that jury instructions that include ill will as an element of actual malice are "constitutionally insufficient." *Rosenblatt v. Baer*, 383 U.S. 75, 84 (1966). *See Beckley Newspapers Corp. v. Hanks*, *supra*, 389 U.S. at 82; *Henry v. Collins*, 380 U.S. 356, 357 (1965).

In the majority's view, the force and reach of these emphatic holdings are limited to establishing that, although ill will alone does not establish actual malice, it is nonetheless probative of actual malice. In my judgment, such a view conflicts with the important principle articulated in *Garrison*—that debate will be inhibited if trials and liability may turn on the extent to which the speaker's feelings toward the subject of the speech may have strayed from a fiercely guarded neutrality. The difference between the recognized chilling effect of the speaker's "risk that it will be proved in court that he spoke out of hatred," *Garrison, supra,* when the proof is *equivalent* to actual malice, and the effect of such risk when the proof is merely *evidence* of actual malice seems to me insubstantial. The powerful insight underlying *Garrison* and subsequent decisions suggests that ill will should not, in any circumstances, be considered probative of actual malice. *See Ryan v. Brooks,* 634 F.2d 726, 731 n.4 (4th Cir. 1980) ("malevolence, ill-will or spite * * * is irrelevant in First Amendment cases").[11]

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[11] Indeed, Justice Brennan, the author of the "actual malice" standard in *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), once suggested that jury instructions be framed strictly in terms of "knowing or reckless falsity" to avoid confusion of "actual malice" in the First Amendment sense with common law malice. *Rosenbloom v. Metromedia, Inc., supra* note 4, 403 U.S. at 52 n.18 (Brennan, J., plurality).

The majority's contention that the question is analogous to the distinction between motive and intent in a murder prosecution, maj. op. at 46-47 n.34, utterly misses the point. For the point in excluding ill will as an element of proof in actual malice is the *Garrison* principle that the admission of such proof chills free speech. It thus rests on important First Amendment concerns. No such principle bears in the murder analogy.

As authority the majority cites two decisions from other circuits, two state cases, and a commentator. Maj. op. at 45-46. One of the decisions from another circuit—*Bose Corp. v. Consumers Union of United States, Inc.,* 692 F.2d 189, 196 (1st

Even if ill will may be probative of actual malice in certain circumstances, however, I am convinced that the evidence which the majority claims to rely on in this case is utterly unable to provide any probative force for a finding of knowledge of falsity or reckless disregard of truth or falsity.

(a) *The* Post. The majority describes the *Post* as "a newspaper which seeks, among other things, hard-hitting investigative stories." Maj. op. at 52. For the majority, this journalistic concern becomes the beginning of evidence of actual malice: "Regardless of whether one chooses to characterize this policy as conducive to 'hard-hitting investigative journalism,' or * * * 'sophisticated muckraking,' it certainly is relevant to the inquiry of whether a newspaper's employees acted in reckless disregard of whether a statement is false or not." *Id.* at 53-54.

This conclusion represents a sharp departure from the principles of free and vigorous discussion that have been

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Cir. 1982), *aff'd*, 104 S.Ct. 1949 (1984)—did not concern any allegation of ill will. To the extent that the decisions, and the commentary that recites them, conflict with the reading of *Garrison* set out above, I necessarily disagree with their interpretation and agree with *Ryan v. Brooks*, 634 F.2d 726 (4th Cir. 1980). Furthermore, one of the most cited opinions of this circuit on actual malice emphasized the difference between common law malice and the requisite *New York Times* knowledge of falsity or reckless disregard of truth or falsity. "Malice, under the pre-*Times* practice, was equated with hostility, vindictiveness or negligent disregard of reputation. Under the *Times* test false statements made with these motives alone are not actionable; malic[e] may be shown only through knowledge of falsity or reckless disregard of truth or falsity." *Washington Post Co. v. Keogh*, 365 F.2d 965, 967 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967). Nothing in *Keogh* suggested that pre-*Times* malice should be considered probative of actual malice under *Times*.

The majority also cites *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). *Butts* relates to the muckraking point, which is discussed in detail in text at 22-25 *infra*.

the touchstone of First Amendment jurisprudence. It is a conclusion fraught with the potential to shrink the First Amendment's "majestic protection," *Bose, supra*, 104 S.Ct. at 1961. In our society speech may be controversial and contentious; words may be intended to arouse, disturb, provoke, and upset. For a primary "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

Muckraking—a term developed when writers like Lincoln Steffens, Ida Tarbell, and Upton Sinclair relentlessly exposed pervasive corruption [12]—may be seen to serve that high purpose even if it offends and startles; so, too, hoping that readers will react in colorful terms to front page stories fits comfortably within the traditions of a free press and a nation that has nothing to fear from an aroused citizenry. As Justice Brandeis observed, "Like the course of the heavenly bodies, harmony in national life is a resultant of the struggle between contending forces." *Gilbert v. Minnesota*, 254 U.S. 325, 338 (1920) (Brandeis, J., dissenting).

Scant authority supports the majority's remarkable innovation in First Amendment jurisprudence. The majority cites Chief Justice Warren's concurring opinion in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 162 (1967) (Warren, C.J., concurring in result), and his reference to "'sophisticated muckraking,'" *id.* at 169 (*quoting Saturday Evening Post* announcement). This is a slim

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[12] *See* S. MORRISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 814 (1965) ("Steffens and his fellow writers (such as Ida Tarbell who showed up Standard Oil, Upton Sinclair of *The Jungle* fame, and Ray Stannard Baker) * * * muckraked to good purpose, exposing the evils of city and state governments, unions, business, the drug trade, and whatever was curably wrong in divers segments of American life.").

reed indeed to support the majority's expansive construciton. Chief Justice Warren's comment is ambiguous and of dubious precedential value.[13] No federal court has ever relied on muckraking as an indication of actual malice, and the Supreme Court has not even mentioned it since *Butts*.

In stark contrast to fundamental First Amendment principles and the clear and convincing evidence of actual malice required by Supreme Court cases from *New York Times* to *Bose*, the majority is prepared to give at least some probative weight to a newspaper's emphasis on attention-getting stories. "Woodward, as editor, wanted from his reporters the same kind of stories on which he built his own reputation: high-impact investigative stories of wrongdoing. * * * From Woodward's testimony it was proper for the jury to infer that the *Post* put some pressure on its reporters to come up with 'holy * * *' stories." Maj. op. at 52-53. Such is the basis for the majority's arresting conclusion that the *Post's* policy contributes to a finding that its "employees acted with reckless disregard of whether a statement is false or not." *Id.* at 54. This deep hostility to an aggressive press is

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[13] Chief Justice Warren's comment provides little support for several reasons. First, the Chief Justice was quoting the magazine's self-description rather than setting forth a standard for evaluating probativeness of actual malice. Second, in reciting the *Saturday Evening Post*'s self-definition he did not explicitly find such a policy probative of actual malice, and he subsequently recounted other evidence clearly probative of actual malice. Third, whatever the meaning of his reference, it is unclear how many Justices shared his view. No other Justice joined that part of his opinion. Justice Harlan's plurality opinion mentioned "sophisticated muckraking," 388 U.S. at 158, but that analysis is structured by a standard of reasonable care, rather than actual malice. Justices Brennan and White agreed that Chief Justice Warren's opinion presented evidence supporting a judgment of actual malice, but their agreement was in very general terms. *Id.* at 172 (Brennan, J., concurring in result).

directly contrary to the mandates of the Supreme Court and the spirit of a free press. Indeed, the majority itself acknowledges that a central objective of *New York Times* is served by a newspaper "acting as watchdog for the public." Maj. op. at 54 n.39. Yet that recognition is flatly inconsistent with the majority's holding that the *Post*'s policy of "hard-hitting investigative journalism" somehow helps to establish recklessness. *Id.* at 53. In my judgment, neither a newspaper's muckraking policy nor its hard-hitting investigative journalism should *ever* be considered probative of actual malice.

(b) *Tyler.* Similarly, even if motive may be probative of actual malice, the facts in the record do not support the majority's finding that Tyler revealed a motive that would represent an indication of actual malice.

Conceding that Tyler "had little reason for *personal* animus," the majority concludes that Tyler wanted "to 'get' Mobil and the Tavoulareases * * * for the sake of a big story and because of [his] general bias against the oil industry." Maj. op. at 47 (emphasis in original). The majority relies on four statements of Tyler and the fact that Mobil had publicly taken issue with a story Tyler had previously written. None of these bits of evidence is substantial enough to suggest a motive indicative of actual malice. Three of the four statements seem well within the scope of a working journalist's vernacular. He speculated that the impact of the story might be to "knock off one of the seven sisters," RE 789, he referred to his article in part as a "case against Tavoulareas," RE 2489, and he characterized a session between Tavoulareas and *Post* editors as one in which the *Post* "blew [Tavoulareas] out of the water." RE 857-858. These statements do reveal that Tyler, in conversation and in a memorandum, sometimes betrayed a less than Diogenes-like demeanor, but that is hardly sufficient to find the

statements probative of actual malice. The fourth statement—that Tyler asked Piro about a source who could gain access to Tavoulareas' safe—is more troubling. But however reprehensible a journalistic practice, such a request is in no sense indicative of a motive suggesting a knowledge of falsity or a reckless disregard of truth or falsity; indeed, if he was not joking it is evidence that Tyler sought documentary support, however objectionably. Finally, to hold that objections by a major company to a reporter's coverage of it is probative of a motive suggesting actual malice serves to chill the kind of aggressive journalism that the First Amendment should foster and that the majority itself recognizes as "a vital service * * * protected by the *New York Times* actual malice standard." Maj. op. at 54 n.39. The record contains evidence that Tyler's assignment to the piece was rooted in the fact that his area of expertise was the energy business, rather than any motive to "get" Tavoulareas and Mobil. RE 2157-2158.

(c) *Golden.* The majority also found that evidence indicating Golden's "primary motive in working on the story was to get a *byline* on a *Post* story," represents "evidence of motive [that] has considerable bearing on whether or not he acted with actual malice." Maj. op. at 52 (emphasis in original). The question before this court is whether Golden acted with knowledge of falsity, or reckless disregard of truth or falsity. A desire to succeed and advance, in the journalistic or any profession, does not pose an inherent conflict with the requirements of professional rigor. Even if Golden was, as the majority asserts, "an ambitious young reporter looking for his big break," *id.* at 51, that ambition seems to me completely irrelevant to the question of knowledge or reckless disregard of falsity; the majority's holding places any reporter who reveals personal ambition in a more vulnerable position. This is not "the breathing space that gives life to the First Amendment." *Bose, supra,* 104 S.Ct. at 1967.

(d) *Piro.* Piro's animosity toward the Tavoulareas family is clear. To the extent that the majority focuses solely in this factor on Piro's motivation, it is, of course, only relevant to the determination of Piro's actual malice. To the extent that the majority also means for this motivation to be relevant to the *Post* defendants' state of mind, the majority seeks to count Piro's motivation in its "cumulation" twice: as discussed below, the majority also counts it in its "reliance on sources" section, *see* text at 40 *infra;* maj. op. at 69.

2. *The* Post*'s editorial decisions.* The majority continues its reliance on unsupported and impermissible factors when it offers two conclusions about the *Post*'s editorial policy as indicia of actual malice—that the *Post* failed to include certain information available to it and that the *Post* consistently resolved ambiguities in the light most damaging to Tavoulareas. As Judge Gasch found, according these conclusions probative weight conflicts sharply with the record in this case and with controlling Supreme Court precedent.

(a) *Failure to include certain information.* The majority rejects Judge Gasch's conclusion that the supposed omission of certain information failed to "show that [Tyler] acted in reckless disregard of the truth," 567 F.Supp. at 659. *See* maj. op. at 61. But the majority misconstrues the holding below, for it writes as though the court had held that suppression of information is *never* relevant to an actual malice inquiry. *See id.* at 61-62. Judge Gasch explicitly recognized that "if the defendants possessed information that showed that some of the article was incorrect, ignoring it would constitute actual malice." 567 F.Supp. at 657. Judge Gasch carefully and properly examined the claimed omissions and determined that the disputed material had been substantially included; as a result, *in this case,* the claimed omissions were not probative of actual malice.

An independent review of the record confirms this conclusion. The majority maintains that three sets of facts were omitted: comments by Mobil outside director Lewis Lapham, information about the benefits of the SAMARCO-Atlas relationship, and internal Mobil memoranda. On the Lapham comments Judge Gasch found: "Despite the fact that the November 30 article did not contain this exact information, it did include at least three paragraphs that conveyed almost everything that Lapham had said." 567 F.Supp. at 658. The differences that the majority points to, maj. op. at 57-59, are hardly substantial enough to be indicative of knowledge of falsity or reckless disregard of truth or falsity. The differences largely amount to whether the *Post* should have included a board member's report of his belief in the Mobil chairman's assurances about the SAMARCO-Atlas relationship along with its report of the Mobil chairman's assurances. To hold such a difference probative of actual malice—even probative "cumulatively"—not only is illogical but thrusts this court far too deeply into the nuances of editorial discretion.

The majority's reliance on the other two claimed omissions is similarly misplaced. The absence of information on the benefits of the SAMARCO transaction lacks any probative weight as an indication of actual malice. "The November 30 article simply did not relate whether the establishment of Atlas was a good or bad business decision." 567 F.Supp. at 659. The majority emphasizes that the *Post* alluded to " 'millions of dollars in business' " and " 'exclusive, no-bid contracts,' " maj. op. at 60; both allusions were undeniably true. Similarly, the substance of the Mobil memoranda—the Mobil executive vice president's announcement of arm's length dealings with SAMARCO and Tavoulareas' statement that he would not be involved in SAMARCO-Atlas matters—were, as Judge Gasch found, "essentially summarize[d]" in the *Post* article. 567 F.Supp. at 659 n.15. Instead of adding that the Mobil executive vice president wrote that deal-

ings were arm's length, the *Post* said only that the Mobil chairman told the Board about the arrangements and Tavoulareas' non-involvement; instead of adding that Tavoulareas wrote the executive vice president to disassociate himself from SAMARCO-Atlas, it reported Tavoulareas' statement that he had disassociated himself. Such variations seem well within the editor's "inevitabl[e] * * * set of choices," *Time, Inc. v. Pape*, 401 U.S. 279, 286 (1971), and it would greatly shrink the "constitutional zone of protection," *id.* at 291, afforded by the *New York Times* principles to hold such judgments even partially probative of actual malice.

(b) *Resolution of ambiguities.* Similarly, the argument that the *Post* consistently resolved ambiguities in the light most damaging to the plaintiff and that this process was at least partially probative of actual malice is supported neither by the governing precedents and principles nor by an independent examination of the record.

The majority premises its discussion about the resolution of ambiguities on its view that, "to the extent that the facts known to the defendants * * * were susceptible of more than one possible interpretation, the numerous instances in which the defendants selected the most damaging—and most sensational—alternative is *some* evidence which a jury, and an appellate court on review, can evaluate in determining whether publication was made with reckless disregard of whether it was false or not." Maj. op. at 57 (emphasis in original).

It is a remarkable feat to reinterpret *Time, Inc. v. Pape, supra*, to establish that reasonable resolution of ambiguities may be probative of actual malice, so long as the resolution is not the sole piece of evidence. The majority accurately quotes the penultimate sentences from *Pape*, maj. op. at 54. Despite the majority's italicization of one word, however, *Pape* contains no hint that reasonable resolution of ambiguities should have

some probative weight in establishing knowledge of falsity or reckless disregard of truth or falsity. The majority's reinterpretation undermines the central thrust of *Pape*—the deference to be accorded "possible rational interpretations" of a situation that "bristle[s] with ambiguities," 401 U.S. at 290,[14] because of the "almost infinite variety of shadings" and "inevitabl[e] * * * set of choices" which confront publishers. *Id.* at 286.

Nor does invocation of cumulation provide the support that *Pape* does not. Indeed, in *Bose* the Court specifically refused to give probative weight to a rational interpretation of an ambiguous situation even in conjunction with other pieces of evidence: "adoption of the language chosen was 'one of a number of possible rational interpretations' of an event 'that bristled with ambiguities' and descriptive challenges for the writer. * * * The choice of such language, though reflecting a misconception, does not place the speech beyond the outer limits of the First Amendment's broad protective umbrella." *Bose, supra,* 104 S.Ct. at 1966 (*quoting Pape*). *See also Ryan v. Brooks, supra,* 634 F.2d at 733 (finding resolution of ambiguities in light most damaging to plaintiff not probative of actual malice even in conjunction with other pieces of evidence). *Pape* and *Bose* thus establish that rational interpretations of ambiguous situations do not contribute to a finding of actual malice.[15]

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[14] *Pape* refers to a document that bristles with ambiguity, but *Bose* makes clear that *Pape* applies to ambiguous situations and events as well. 104 S.Ct. at 1966.

[15] The majority's reliance on *Rebozo v. Washington Post Co.*, 637 F.2d 375 (5th Cir. 1981), is misplaced. *Rebozo* is ill-conceived, contrary to *Pape* and *Bose*, and of weak precedential value. In concluding that resolution of ambiguities may be probative of actual malice, *Rebozo* did not even cite, much less consider, *Pape*, the governing Supreme Court decision on the subject. Instead, it offered cites to pages in *New York Times Co. v. Sullivan, supra* note 11, and *St. Amant v. Thompson*, 390 U.S. 726 (1968), that merely recite the actual malice standard. 637 F.2d at 382.

Whether or not the majority's view is accepted, however, it is at least clear that some sustained consideration of the relevant interpretations and the underlying events to which they refer is required to evaluate the resolution of ambiguities. The majority makes no such serious effort to evaluate the interpretations at issue; indeed, it does not even identify them. Rather, the majority is content to assert that there was a "*consistent* selection of the inferences most damaging to the Tavoulareases," maj. op. at 54 (emphasis in original), without specifying which inferences and what they were inferring. Such a blanket, unexplained assertion is far from the rigorous, independent evaluation of the record required by *New York Times* and subsequent decisions.[16]

3. The Checket conversation and the "dispatch" of Hoffmann. The majority cites a conflict between the Tyler and Checket accounts of the substance of their

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[16] The only interpretation to which the majority specifically alludes is the reference to securities laws. Maj. op. at 64-67. The majority apparently attaches some weight to this reference, but declines to elaborate on the significance this reference is supposed to assume within the majority's grand scheme of "cumulation." Clearly, the reference adds nothing to a finding of knowing or reckless falsity. Virtually all of the sentences are completely accurate. The parties dispute whether the relevant securities regulation would have applied to Tavoulareas. It is undisputed, however, that a congressional hearing specifically addressing this question of securities law resulted in a debate between top SEC officials about whether full disclosure requirements would have attached even without the son living in the same household. *See Securities Law and Corporate Disclosure Regulations, 1982: Hearings Before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce*, 97th Cong., 2d Sess. 261-262 (1982). It is also undisputed that the *Post* reported Mobil's claim that it had fully complied with securities law. ¶ 11. The *Post*'s description of a point of securities law so murky that top SEC officials could not agree on it hardly amounts to the significant role the majority seeks —evidence that contributes to a finding of clear and convincing proof of actual malice.

conversation as an indicium of actual malice. Maj. op. at 62-64. According to the majority, this conflict is probative of actual malice because the Checket conversation is the only source besides Piro for the article's statement that Tavoulareas "personally dispatched" Hoffmann to Atlas. The majority concludes, "[I]t is clearly possible that Tyler deliberately falsified his notes." *Id.* at 64. The majority thus rejects Judge Gasch's conclusion that "Tyler may * * * have been negligent in transcribing Checket's statement but plaintiff introduced no evidence that would show that Tyler deliberately falsified this document." 567 F.Supp. at 661 n.18.

The majority's emphasis on the Checket conversation is misguided. For the undisputed evidence in the record reveals that the Checket conversation—under either version—was far from Tyler's sole source for the conclusion that Tavoulareas "personally dispatched" Hoffmann. As found by Judge Gasch, Tavoulareas "apparently participated to some extent in the discussions that led to Hoffmann's temporary assignment at Atlas." *Id.* at 661. The majority simply ignores this finding. Yet the evidence in the record fully supports Judge Gasch's determination. Wolfe wrote to Tyler that "Mr. Tavoulareas played a minor role * * * in the arrangements made when G. Comnas departed from Atlas. Since it was on Mobil's recommendation (including Mr. Tavoulareas'), because of long personal acquaintance with G. Comnas, that he negotiate with SAMARCO it was logical that Mr. Tavoulareas participate to the extent of assuring a settlement that was fair and equitable to both parties * * *. Since Mobil had originally recommended G. Comnas to SAMARCO, we felt an obligation to SAMARCO to maintain quality management of their operations. We made H. R. Hoffmann * * * available as an interim manager of Atlas." RE 2345.[17] In the face of this un-

[17] At trial Wolfe also testified that Tavoulareas was present during the discussion about Comnas' departure. RE 1385.

disputed statement *by Mobil*—acknowledging that Tavoulareas played a role, albeit "minor," in Comnas' departure, and then shifting to "we" without distinguishing Tavoulareas—the majority's emphasis on the Checket conversation is plainly mistaken.[18]

4. *Other indicia of actual malice.* The majority cites three "other indicia of actual malice"—the *Post's* failure to retract, the lack of deadline pressure, and the knowledge of the harm the article would cause. All three are of questionable legal force; even if all three were valid indicia of actual malice, the evidence in the record does not support a finding that they were indicia of actual malice in this case.

In considering the *Post's* refusal to retract the majority argues that "[t]he correct view" is that " '[u]nder certain circumstances evidence [of a refusal by a publisher to retract a statement after it has been demonstrated to him to be both false and defamatory] . . . might be relevant in showing recklessness at the time the statement was published.' " Maj. op. at 76 (brackets in original; citation omitted). The majority brushes aside the Supreme Court's view in *New York Times* that a refusal to retract was not probative of actual malice by arguing that the Court's use of the word "adequate" meant only that refusal to retract could not be the *sole* evidence. *Id.* The majority fails to mention, however, that the Court was considering the refusal to retract along with other claimed pieces of evidence. *See New York Times*, *supra*,

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Wolfe was ambiguous about whether Tavoulareas had actually participated in the decision to dispatch Hoffmann. RE 1390-1394.

[18] The majority claims that Tyler testified that Piro and Checket were his only sources for the "personally dispatched" allegation. Maj. op. at 62. Yet Tyler specifically pointed to Paul Wolfe's confirmation as well. RE 2089. Furthermore, Mobil's response to Tyler is indisputably part of the record that is within the scope of our review, and the *Post* article itself reported much of the statement. ¶¶ 79, 84.

376 U.S. at 286-287.[19] Similarly, the majority does not mention that, in *Bose*, the Court did not even consider the publisher's refusal to retract, which it had mentioned in its statement of facts, 104 S.Ct. at 1953, when it considered *all* of the possible facts which might lead to a determination of actual malice. *Id.* at 1965-1967.

Even if the majority's view is accepted, however, there is no evidence in the record to support the view that there had been the necessary demonstration to the *Post* of falsity and defamation. The majority does not pause to explain when and how such a demonstration—essential, under the majority's formulation, if refusal to retract is to be considered an indicium of actual malice—was made. In addition, the *Post* reported Mobil's response in two articles (on December 1 and December 4) as well as additional facts provided by Mobil (on December 7). RE 2559, 2561, 2562.

The majority also argues that the absence of deadline pressure was "evidence that the jury could fairly consider" because "[t]he defendants had ample time to search for corroboration of Comnas' statements." Maj. op. at 75. Even if such a relationship between deadlines and constitutional principles were established,[20] the evidence in the record does not support a finding that the timing of *this* article was probative of actual malice. First, as will be discussed *infra*, Comnas' statements had largely been corroborated by other sources. Second, Tyler's investigative efforts over the course of the month that he spent researching this article establish consider-

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[19] Indeed, *New York Times* specifically left open the question whether a failure to retract might *ever* be probative of actual malice, and limited its holding to determining that a failure to retract under the circumstances of the case clearly was not probative of actual malice. 376 U.S. at 286-288.

[20] *Cf.* R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 216 n.175 (1980) ("Whether or not a communication is 'hot news' ought not to be overemphasized.").

able efforts to corroborate. Third, since Mobil gave no indication of further cooperation, it is difficult to see what further efforts Tyler should have undertaken. Fourth, despite the majority's comment about the "[a]bsence of time pressure," maj. op. at 75, undisputed evidence in the record suggests substantial time pressure—Tyler had learned both that a congressional committee would soon go public with the relevant information and that the *New York Times* was also investigating the story. RE 1100, 1126. Under the majority's own terms, then, the timing of publication in this case does not amount to evidence of actual malice.

Finally, the majority alludes to "[k]nowledge of the harm likely to follow publication" as an indication of actual malice. Maj. op. at 74. In contrast, in a series of cases in which serious harm was obvious the Supreme Court has not even mentioned knowledge of harm as a possible factor probative of actual malice. *See, e.g., St. Amant v. Thompson*, 390 U.S. 726 (1968) (allegation of corruption); *Time, Inc v. Pape, supra*, 401 U.S. 279 (allegation of police brutality). Furthermore, if knowledge of harm has any probative weight it must be slight, for an inquiry into knowledge of harm diverts from the central inquiry into knowledge of falsity.

C. *Potentially Probative Factors*

The majority argues that we must consider the indicia of actual malice as cumulative circumstantial evidence, but since the indicia analyzed above are unsupported, either in the governing legal principles or in the record, cumulation of them is equally without weight. Our inquiry must focus, therefore, on the two potentially probative sources—the Peterson memorandum and the reliability of sources. These factors may be bricks, but they utterly fail to build the majority's wall: they fail to establish, by clear and convincing evidence, knowledge of falsity or reckless disregard of truth or falsity.

1. *The Peterson memorandum.* Judge Gasch considered the Peterson memo at length. The majority, however, misconstrues his analysis of the inferences that could reasonably be drawn from it. Undertaking the required review of the record, Judge Gasch concluded that "[t]here is *no evidence whatsoever* to show that Ms. Peterson had any 'inside' information about Tyler's sources or research that would enable her to know, or even suspect, that the story was inaccurate. She was merely expressing her uninformed opinion that she found the story hard to believe." 567 F.Supp. at 655 (emphasis added). The majority fails to offer a shred of evidence which contradicts this finding. Instead, it seeks to emphasize the jury's right to disbelieve Peterson's testimony. But even if Peterson's testimony is disbelieved, the rejection of her testimony clearly fails to provide affirmative evidence that her opinion was informed, rather than uninformed. *See Bose, supra,* 104 S.Ct. at 1966 ("discredited testimony is not considered a sufficient basis for drawing a contrary conclusion"); *Moore v. Chesapeake & Ohio R. Co.*, 340 U.S. 573, 576 (1951).

There is no evidence in the record to support the view that Peterson's opinion was informed. Indeed, the memo as a whole makes clear that Peterson had *no* knowledge of sources and research beyond what she had read in the article. RE 2486-2487. Furthermore, the undisputed evidence in the record does establish that Tyler produced a point-by-point rebuttal to the Peterson memo for Greider, the senior editor ultimately responsible for the article. RE 2487-2491. Under these circumstances the thrust of the trial court's analysis was eminently correct; the evidence in the record did not support the view that Peterson's memo proved the *Post*'s knowledge of falsity, or reckless disregard of truth or falsity. At most, it shows that the editor with ultimate decisionmaking responsibility had before him two paragraphs raising doubts from an editor—in whatever role—who had no independent knowledge of the subject or sources and the lengthy re-

buttal, as well as the article itself, from a reporter who had previously written about energy issues and who had spent a month of research on the subject and sources. The inference of actual malice—or even a substantial indication of actual malice—that the majority seeks to draw is unwarranted.

To be sure, the majority does not quite claim that the Peterson memo itself provides clear and convincing proof of knowing or reckless falsity. Plainly, the memo could not bear such interpretation. Instead, the majority seeks to impute some additional weight to the memo through the coloration of other pieces of evidence. Maj. op. at 43. But, as discussed, the majority's "other evidence," *id.*, consists largely of totally impermissible and insubstantial considerations—a newspaper's reputation, a journalist's ambition, the reasonable resolution of ambiguity, and the like. These inappropriate factors cannot bolster the Peterson memo and give it some added force; the memo must be evaluated without the distortion of such unacceptable considerations.

Since the evidence in the record does not support a view that Peterson's opinion was informed, and since the evidence in the record establishes that Tyler and the *Post* editors engaged in far more extensive preparation and investigation than Peterson, the Peterson memo fails to assume the probative weight adopted by the majority and properly rejected below.

2. *The reliability of sources.* The majority correctly notes that "[r]eliance on the unsupported word of obviously biased sources for key allegations is *evidence* which a jury is entitled to consider in evaluating the existence of actual malice." Maj. op. at 74 (emphasis in original). The validity of this general proposition is clear. *See St. Amant v. Thompson*, *supra*, 390 U.S. at 732. But in this case the evidence in the record does not support the necessary finding that the defendant relied on "the un-

supported word of obviously biased sources for key allegations." *Id.*

(a) *Comnas.* "[R]eliance upon George Comnas," Judge Gasch concluded, "* * * does not come close to approaching the level of recklessness required by the Supreme Court." 567 F.Supp. at 656. The majority rejects this conclusion.

The majority argues that the evidence in the record supports a finding that Tyler had reason to doubt Comnas' veracity. Relying primarily on Tyler's awareness of allegations that Comnas left Atlas because of dissatisfaction over his business performance, it thus rejects Judge Gasch's conclusion that such awareness did not necessarily constitute reliance on an obviously unreliable source. True to its method, the majority discards the evidence in the record mitigating the view that reliance on Comnas was an act of recklessness. As Tyler knew, Tavoulareas had told the SEC that "our people had every confidence in the world" in Comnas. RE 2446. Similarly, on Mobil's behalf Paul Wolfe wrote Tyler of Tavoulareas' "long personal acquaintance with G. Comnas" and "Mobil's recommendation" of Comnas. RE 2345. Tyler had also read Comnas' testimony to congressional investigators, which corresponded to his statements to Tyler. RE 2129-2131, 2467-2745. The majority maintains that Tyler must have known of rumors about Comnas being involved in scandals. However, except for Piro's statement the majority is unable to point to a shred of evidence suggesting Tyler's knowledge of these rumors. Instead, it asserts that Kousi must have told Tyler of rumors involving Comnas even though Kousi never offered such testimony. Maj. op. at 71. As Judge Gasch found, Tyler's knowledge of Comnas' background, placed in the context of the evidence in the record rather than the majority's skewed presentation, fails to assume the great probative weight that the majority seeks. *Cf. St. Amant v. Thompson, supra,* 390 U.S. at 733 (reliance on a dissident union member's comments

about the union leadership did not amount to "evidence in the record of [the dissident's] reputation for veracity").

Critically, whatever Tyler's knowledge of Comnas' background, the majority finds an "absence of * * * corroboration" for Comnas' statements. Maj. op. at 70. However, as Judge Gasch found, "[M]uch of Comnas' information was independently verified by other sources whose credibility even the plaintiff does not now challenge." 567 F.Supp. at 656. For instance, the majority directs its attention to Comnas as the source of the *Post* statement that "Tavoulareas 'set up' Peter by 'personally urging' his inclusion in Atlas." Maj. op. at 70. Yet the evidence in the record is clear that former SAMARCO director Kousi, whose credibility has not been challenged, told Tyler that the hiring of Peter was a "nepotistic act." RE 1165, 1237, 1927-1928. The majority summarily and unjustifiably rejects this evidence because Kousi's deposition contained "no supporting facts" for this conclusion. Maj. op. at 70 n.45. Given Kousi's position, knowledge, and undisputed veracity, his comment should be credited as corroboration of Comnas; it is at least a significant piece of evidence that compels greater attention and weight than the majority accords it. Furthermore, as noted, Comnas' statement was also at least partially corroborated by Tavoulareas' SEC testimony about his recruitment of Comnas and knowledge of Comnas' business relationship with his son. RE 2424-2425. On behalf of Mobil, Wolfe also confirmed that Tavoulareas had played a major role in establishing SAMARCO and Atlas and in recruiting Comnas. RE 2344-2345. The record thus shows that Tyler corroborated the major pieces of information provided by Comnas. The use of questionable sources does not contribute to a finding of actual malice when the writer "used nothing from it that was not also found in his other sources." *Ryan v. Brooks, supra,* 634 F.2d at 733.

(b) *Piro.* Judge Gasch found that Piro "was not a primary, or even a secondary, source for the November 30 article." 567 F.Supp. at 657. In contrast, the majority points to three statements for which it claims that Piro was an important source. The various sources for two of these statements—that Tavoulareas "personally dispatched" Hoffmann and that he "personally urged" Peter's inclusion as a partner—have been discussed at length. The third statement—that Tavoulareas expressed an interest in "giving Peter a little nudge to get him along"—was specifically attributed to Piro; Piro's estrangement from the family was clearly noted; and Tavoulareas' denial was fully reported. ¶ 29. Moreover, the record is clear that Tyler chose not to use information provided by Piro which he could not corroborate from other sources. Under these circumstances, the quoting of Piro failed to establish a reliance on unreliable sources that carries significant probative weight in establishing actual malice by clear and convincing evidence.

Summary

Tyler and the *Post* editors had various sources of information before them supporting a belief in each of the challenged statements. Most of the factors cited by the majority are insubstantial or inappropriate; the Peterson memo and the reliance on sources simply do not establish clear and convincing evidence of knowledge or reckless disregard of falsity. In short, the majority's "wall" is a house of cards that collapses under the rigorous scrutiny demanded by precedent and principle.

IV. Tavoulareas' Status as a Limited Purpose Public Figure

The actual malice standard, of course, must be met only if Tavoulareas is a public figure, or for punitive damages if he is a private person. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342, 350 (1974). *Gertz* also estab-

lished two types of public figures: *general purpose*, those of "general fame or notoriety in the community, and pervasive in the affairs of society," *id.* at 352, and *limited purpose*, those who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id.* at 345.

Judge Gasch determined, on the basis of this circuit's controlling opinion in *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980), that Tavoulareas was a limited purpose public figure. Though the majority finds it unnecessary to reach the issue because of its conclusion that the defendants acted with actual malice, it expresses reservations about this determination. *See* maj. op. at 15 n.12. I believe that Judge Gasch's analysis was eminently sound and fully supported by the evidence in the record.

Waldbaum sets forth the standards for determining public figure status. "[T]he general public figure is a rare creature," 627 F.2d at 1292, because general public figure status must be supported by "'clear evidence of general fame or notoriety in the communtiy, and pervasive involvement in the affairs of society.'" *Id.* (*quoting Gertz v. Robert Welch, Inc.*, *supra*, 418 U.S. at 352). Limited public figure status is determined by a three-prong test: (1) "the court must isolate a public controversy," *id.* at 1296, (2) "the court * * * must analyze the plaintiff's role in it," *id.* at 1297, and (3) "the alleged defamation must have been germane to the plaintiff's participation in the controversy." *Id.* at 1298.

Judge Gasch determined that all three prongs of the *Waldbaum* test were met. For the first prong—the public controversy requirement—he concluded, "[T]he Court is convinced that defendants have established the existence of a public controversy over Mobil's (and William Tavoulareas') business dealings in Saudi Arabia and also over Mobil's (and William Tavoulareas') role in Samarco

and its business—through Samarco—with Atlas *prior* to the publication of *The Post*'s two articles on the subject." Memorandum Opinion of District Court in Civil Action No. 80-3032 filed July 26, 1982 (Mem. Op.) at 7, RE 715 (emphasis in original). The evidence submitted by the defendant leaves no doubt that Tavoulareas eagerly sought and obtained the public spotlight to advocate views on relations with Saudi Arabia,[21] and to feature Mobil's efforts in Saudi Arabia, including the SAMARCO relationship.[22] This controversy—Mobil's dealings with Saudi

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[21] *See, e.g.*, RE 268, 271 (Tavoulareas' remarks to National Society of Security Analysts, Nov. 24, 1975: "Now, I'd like to talk about Saudi Arabia. You may have wondered why Mobil is giving so much attention to that country. * * * Saudi Arabia is where the oil is."); RE 288, 300 (Tavoulareas' remarks to Nomads Luncheon, Nov. 12, 1979: "All consuming governments should demonstrate appreciation to those moderate OPEC governments—particularly Saudi Arabia—that consistently play a restraining role in OPEC deliberations. This appreciation should take the form of public statements and preferential mutual-assistance programs."); RE 304, 309 (Tavoulareas' testimony before Subcommittee on Multinationals, Senate Foreign Relations Committee, June 16, 1974: "A government negotiated arrangement is vulnerable to a weakness which is not present with private negotiations. * * * Aramco has been able to continue operating in Saudi Arabia during the period when exports from Saudi Arabia to the United States were totally embargoed."); RE 326, 334 (Tavoulareas' testimony before Energy Subcommittee, Joint Economic Committee, June 2, 1976: "Generally, the Saudis have adopted more moderate positions on price than other OPEC members. * * * It is of vital importance to the interests of the United States and the rest of the free world that Saudi Arabia continue to feel justified in increasing production, even though it will thereby also continue to amass dollar surpluses."); RE 427, 429 (Tavoulareas quoted in Mobil press release, June 29, 1977: "[B]y providing services to the Saudis through participation in their projects, we expect to secure long-term access to additional crude and products.").

[22] *See, e.g.*, RE 274, 275-276 (Tavoulareas' remarks to Security Analysts Seminar, Sept. 28, 1977: "Mobil has taken a broad range of steps to improve its access to [Saudi Arabia's]

Arabia in general and SAMARCO in particular—thus clearly met the *Waldbaum* standard for establishing a public controversy. "[T]he issue was being debated publicly and * * * it had foreseeable and substantial ramifications for non-participants," 627 F.2d at 1297—as Tavoulareas repeatedly stressed in his public remarks. "In coming forward to play a prominent role in a heated controversy he rendered himself a public figure—someone who might expect public commentary both admiring and, as is not uncommon when passions run high and substantial interests are at stake, of a hurtful and perhaps unfair nature." *McBride v. Merrell Dow & Pharmaceuticals, Inc., supra*, 717 F.2d at 1466.

The second and third prongs are sufficiently indisputable as to merit only brief discussion. The second prong concerns Tavoulareas' role in the public controversy: "William Tavoulareas undeniably played an important role at least in the conception of Samarco as a joint American-Saudi Arabian shipping concern and in the formulation of the idea for an independent ship management company in the nature of Atlas. He also is the chief architect of Mobil's special relationship with the Saudi Arabians." Mem. Op. at 7, RE 715. Similarly,

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vast reserves of hydrocarbons. * * * Mobil is a 45% partner with private Saudi interests in SAMARCO, a shipping company that transports crude and products under the Saudi flag."); RE 382, 386 (Tavoulareas' article in COLUMBIA JOURNAL OF WORLD BUSINESS, Summer 1977: "Mobil has shown a long-standing interest and commitment to Saudi Arabia through its involvement in Aramco and SAMARCO [and other projects]. Responding positively to Saudi Arabia's development plans and objectives, Mobil is working on a variety of projects that will benefit both Saudi Arabia and Mobil as well as the free world. * * * [SAMARCO and another marine venture] respond to Saudi Arabia's desire to develop its own shipping industry."); RE 430, 433 (Tavoulareas quoted in Mobil press release, Sept. 28, 1977: "Our Saudi Arabian ventures are economically attractive, besides strengthening our identity in that country.").

the third prong is also clearly satisfied: "[T]he alleged defamation unquestionably concerned one aspect of the overall Mobil-Saudi Arabian relationship or, more narrowly, of the specific Mobil-Atlas-Samarco relationship." *Id.*[23]

Furthermore, Tavoulareas' leadership on a broad range of public issues is at least noteworthy. He has taken great pride in the role of public advocate and has urged others to follow his, and Mobil's, lead.[24] This leadership

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[23] Having decided "not [to] reach the issue," maj. op. at 15, the majority cannot resist offering, in wholly conclusory terms, an assumption that flies in the face of precedent and logic. The majority's apparent view is that the third prong of *Waldbaum* is probably not satisfied because the controversy over SAMARCO is not germane to Tavoulareas' prominent public role as an outspoken advocate of Mobil's special relationship with Saudi Arabia. *Id.* at 15 n.12. This is akin to arguing that a vigorous public advocate of, for instance, night flights into National Airport would not be a public figure for purposes of a controversy involving a particular night flight for which the advocate bore substantial responsibility. Clearly, in this case and in the night flights example, the specific incident bears a sufficient relationship to the particular controversy to satisfy the *Waldbaum* germaneness prong.

[24] *See, e.g.*, RE 288, 302 (Tavoulareas' remarks to Nomads Luncheon, Nov. 12, 1979: "I'd like to ask you to join us in an effort we have been making throughout the '70's to overcome the obstacles created by our government and special-interest groups. As you know, Mobil has gotten the reputation of being probably the most outspoken company on public issues, through our newspaper advocacy advertising and other public statements. It's not always comfortable being in the limelight, particularly when the President of the U.S. calls us perhaps the most irresponsible company in the country. But we think the effort has been worth making and we're going to go on with it."); RE 391, 393 (Tavoulareas' article in ST. JOHN'S ALUMNI QUARTERLY, Spring 1979: "[W]e've come to rely on print ads to make our points, though we also try everything we can (like sending our executives out around the country). Still, it's hard to make ourselves believed, or even heard. * * * After all our years of talking, there is finally evidence

role has been especially conspicuous on energy issues.[25] Such leadership is particularly significant because Tavoulareas commands media attention and space virtually at will. Indeed, Tavoulareas has relished Mobil's extensive publicity operation, including its ability to purchase response space in major newspapers. *See* RE 393. He thus has the capacity for "self-help" that the Supreme Court has recognized as an important attribute of a public figure. *Gertz v. Robert Welch, Inc., supra,* 418 U.S. at 344.

It is instructive to compare Tavoulareas and Mobil with the plaintiff and his company in *Waldbaum.* The court judged Waldbaum to be a limited purpose public figure because Waldbaum " 'did not become merely a boardroom president whose vision was limited to the balance sheet. He became an activist, projecting his own image and that of the cooperative far beyond the dollars and cents aspects of marketing.' " 627 F.2d at 1300 (*quoting* District Court). On a far broader scale and with far more success, Tavoulareas also became an activist and projected an image far beyond the dollars and cents of oil marketing.[26]

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that, at last, somebody *is* listening. We're cautiously encouraged because newspaper and broadcast editorials have begun to see merit in our arguments. * * * Washington may not be heeding the expert yet, but we're hopeful." (emphasis in original)).

[25] *See, e.g.,* RE 488-582 *passim* (articles reporting Tavoulareas' views on oil price decontrol).

[26] In *Waldbaum* this court noted that, although "[b]eing an executive within a prominent and influential company does not by itself make one a public figure[,] * * * [s]ometimes position alone can make one a public figure." 627 F.2d at 1299 & n.36. The court elaborated:

> The position itself may be so prominent that any occupant unavoidably enters the limelight and thus becomes generally known in the community—a general public figure. Similarly, the responsibilities of a position may in-

V. GOLDEN

I concur in the judgment affirming the j.n.o.v. with respect to Golden. I concur, however, not only because I share the publication concerns raised in the majority opinion, but also because I am convinced that the record does not contain clear and convincing evidence of actual malice on Golden's part.

VI. PIRO

Tavoulareas claims that three of Piro's statements are false and defamatory: (1) that William Tavoulareas set up his son as a partner in Atlas; (2) that William Tavoulareas arranged for Peter's first job with C. M. Lemos & Company; and (3) that Tavoulareas dispatched a senior executive to help run Atlas. Brief for appellant at 29.[27]

> clude decisionmaking that affects significantly one or more public controversies, in which case *the occupant becomes a limited public figure for those controveries.* Courts should avoid generalizing, however, for labelling certain positions as always being public is tantamount to making subject-matter classifications, forbidden under the case law. * * *

Id. at 1299-1230 n.36 (emphasis added).

An analysis of this particular case suggests that Tavoulareas' position—president of one of the world's largest corporations whose decisions play a major role in national energy policy—is precisely one of such public power and prominence that the position itself confers at least limited public figure status with respect to energy issues. Given the public controversy about Mobil's efforts in Saudi Arabia, including SAMARCO, such a determination is unnecessary to this case.

[27] As the majority points out, maj. op. at 83, Tavoulareas' complaint included a fourth Piro statement—the "little nudge" comment. Since Tavoulareas does not pursue this comment in his appeal, brief for appellant at 29, and since the context for this comment is similar to the context of the "set up" comment, I do not address the "little nudge" comment separately.

The majority again misconstrues Judge Gasch's opinion. Judge Gasch, while noting that Piro poses "a more difficult question of the existence of actual malice" than the *Post* defendants, Memorandum-Order of District Court in Civil Action No. 80-2387 filed May 29, 1983, at 2 n.2, RE 766, properly emphasized the lack of clear and convincing evidence of knowledge or reckless disregard of falsity.

In stating that Tavoulareas set up his son, Piro knew that Peter Tavoulareas had received a lucrative job in a concern that was involved in a business relationship with Mobil, which William Tavoulareas headed. RE 907. The majority ignores this knowledge. As a result the majority misconceives the meaning of Piro's ignorance of the complexities of the Mobil-SAMARCO-Atlas transactions. For the point is not that statements made in ignorance are automatically protected; rather, the point is that the ignorance, *in conjunction with his knowledge*, did not provide evidence of knowledge or reckless disregard of falsity.

For the statement about Peter's job, Piro knew that Lemos was a friend of the Tavoulareas family and that Peter obtained a job at his firm. RE 899. Indeed, in his SEC testimony Tavoulareas testified that he played no role in Peter getting the job, but conceded that Lemos "was a personal friend" and "must have known he was my son." RE 2414. Though Piro did not know any further details, this ignorance, considered with his knowledge, does not provide the necessary affirmative evidence of actual malice.

Finally, the statement about dispatching an executive poses the hardest question, but it also fails to establish actual malice. Piro said that he overheard Tavoulareas telling Checket he had personally dispatched Hoffmann. RE 2089-2090. Checket testified that he did not recall this conversation. RE 1844. Yet even if Checket's testimony is believed and Piro's disbelieved, there is no af-

firmative evidence that Piro knew of or recklessly disregarded falsity. As *Bose* stresses, 104 S.Ct. at 1966, disbelieving Piro's testimony is not affirmative evidence of the contrary proposition. The record contains no clear and convincing evidence that Piro's statement about the Checket conversation was based on actual malice, rather than on any number of possible other explanations—such as a misunderstanding or a mistake. Thus the third statement also fails to meet the high standard for actual malice emphasized in *Bose*. Though it is a far closer case for Piro than for the *Post* defendants, Tavoulareas has failed to prove by clear and convincing evidence that Piro's statements were made with knowledge or reckless disregard of falsity.

VII. Conclusion

The central question is whether the Constitution's guarantee of free speech protects the disputed statements published by the *Post*. Tyler knew that Tavoulareas personally recruited his son's business associate to run a Mobil-conceived company and that Tavoulareas' son ultimately landed a lucrative partnership at the company; he wrote that Tavoulareas "set up" his son. Tyler knew that Tavoulareas personally participated in the arrangements for a transition in leadership at the Mobil-conceived company; he wrote that Tavoulareas "personally dispatched" the Mobil executive who assumed command of the company. Tyler knew that the Mobil plans called for Mobil ships to be managed by the Mobil-conceived company after being leased to SAMARCO; he wrote that Mobil "provided" ships to the company. These statements emerged in the course of an extensively researched 85-paragraph story, fully a fourth of which recounted Mobil's version of the disputed events. I have no doubt that the Constitution protects these statements in the circumstances under which they were made.

This is an extremely important First Amendment case. If this excessive jury verdict on these mundane, flimsy

facts is upheld, the effect on freedom of expresion will be incalculable. The message to the media will be unmistakable—steer clear of unpleasant news stories and comments about interests like Mobil or pay the price. Thus we will have created a class of untouchables and abandoned our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan, supra*, 376 U.S. at 270.

I respectfully dissent.

Opinion on Motion for Rehearing

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1604

WILLIAM P. TAVOULAREAS, APPELLANT

PETER TAVOULAREAS

v.

PHILIP PIRO

No. 83-1605

WILLIAM P. TAVOULAREAS, APPELLANT

PETER W. TAVOULAREAS

v.

THE WASHINGTON POST COMPANY,
d/b/a THE WASHINGTON POST,
a Delaware Corporation, et al.

On Petition to the Panel for Rehearing

Filed June 11, 1985

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Edward Bennett Williams, David E. Kendall, Kevin T. Baine, and *Scott M. Matheson, Jr.* were on the Petition of Appellees The Washington Post Co. and Patrick Tyler for Rehearing by the Panel.

David Machanic was on the Petition of Appellee Philip Piro for Rehearing by the Panel.

H. Bartow Farr III, Robert D. Luskin, and *Paul M. Smith* were on the Petition of Appellee Sandy Golden Regarding Petitions for Rehearing by the Panel.

Before: WRIGHT and SCALIA, *Circuit Judges,* and MACKINNON, *Senior Circuit Judge.*

Opinion for the Court filed by *Senior Circuit Judge* MACKINNON.

Dissenting statement filed by *Circuit Judge* WRIGHT.

MACKINNON, *Senior Circuit Judge* (SCALIA, *Circuit Judge,* concurring): Attorneys for the Washington Post Co. and Patrick Tyler have requested this division of the court to rehear the foregoing decision.[1] However, the argumentative support for the petition is fatally defective in three principal respects, among others.

First, it ignores the evidence of record and misrepresents the court's decision as a general "disparagement of investigative reporting" that seeks to premise "constitutional malice" on pure "hard-hitting investigative stories [and] . . . high-impact investigative stories of wrongdoing . . . [by a] newspaper [that] is generally vigorous in its efforts to seek out and report the news." Petition at 2-3. That description completely refuses to recognize the evidence of very substantial "*pressures*" and lax editorial processes that were fully developed in the record and that contributed materially to the finding by the

[1] Appellee Philip Piro petitions for rehearing and adopts the reasons stated in the *Post's* petition. Appellee Sandy Golden states that he does not seek rehearing of the panel's affirmance of the judgment entered by the district court in his favor.

jury that the *Post* article on Tavoulareas recklessly disregarded the truth. Media advocates, like those who have filed an amicus brief in support of rehearing, should take a hard look at the evidence in *this case* before attempting to come to the defense of the *Post's* so-called "investigative reporting" as it appears in this transcript. It is *not* normal "investigative reporting."

Second, the Petition for Rehearing contains not one line recognizing the reality that the *Post* is confronted with an adverse *jury verdict* and that the law applicable to judgments notwithstanding the verdict (j.n.o.v.) does not confer free reign to override the *credibility* findings inherent in the jury verdict. This case is not like *Bose Corp. v. Consumers Union of United States, Inc.*, 52 U.S.L.W. 4513 (U.S. Apr. 30, 1984), which involved a bench trial and written findings by the judge. Instead we must first determine what findings of fact the jury verdict could be based upon. Neither the petitioners nor the dissent recognizes this obligation, much less applies the law applicable to jury findings in such cases.

Third, the petition does not face up to the Peterson memorandum, the general unreliability of sources, the permissible effect on the jury verdict of the *Post's* failure to introduce one line of the deposition of Comnas, who was the *Post's* principal source, and to even recognize that Checket personally contradicted Tyler's written note that he had overheard Tavoulareas stating he personally dispatched Hoffmann to Atlas. This latter point also is contradicted by Wolfe's testimony that *he* made the decision to send Hoffmann to Atlas (Tr. 1098).

In sum, the *Post* presented a weak defense highlighted by the complete failure to present one bit of the deposed testimony of the principal source they allegedly relied upon for the story. Their whole defense was dependent upon the *credibility* of their few witnesses which the jury obviously did not believe—and the jury was *not* required to believe them, because their testimony in its critical

aspects was specifically contradicted by plaintiff's witnesses which we find were reasonably believable.

A. *The Court's Task*

This case required us to perform "the delicate and sensitive task of accommodating the First Amendment's protection of free expression of ideas with the common law's protection of an individual's interest in reputation." *Ollman v. Evans*, 750 F.2d 970, 974 (D.C. Cir. 1984) (en banc), *cert. denied*, 53 U.S.L.W. 3837 (U.S. May 28, 1985) (No. 84-1524). Our duty was twofold: to protect the "freedom of . . . the press" privilege of the First Amendment and to remedy harm to innocent persons caused by abuse of that privilege. As was recognized in *Ollman*, this task is by no means new and is clearly a difficult one. The principle that "debate on public issues should be uninhibited, robust, and wide-open," *Tavoulareas v. Piro*, Nos. 83-1604, 1605, slip op. at 49 (Wright, J., dissenting) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)), must be reconciled with "an individual's interest in his or her reputation [which] is of the highest order," *Ollman*, *supra*, at 974. Again, as was emphasized in *Ollman*, the protection of one's reputation

> is an eloquent expression of the respect historically afforded the dignity of the individual in Anglo-American legal culture. A defamatory statement may destroy an individual's livelihood, wreck his standing in the community, and seriously impair his sense of dignity and self-esteem.

Id. (footnote omitted); *accord*, *Herbert v. Lando*, 441 U.S. 153, 169 (1979).

It is within the framework of *New York Times v. Sullivan* and its progeny that the two competing interests of robust debate and the justifiable protection of individual reputations must be accommodated. Petitioners Washington Post Co. and Patrick Tyler first argue that the panel opinion "fundamentally alters the very concept of 'actual malice,'" that evidence considered relevant in

this case on the actual malice issue has been held by the Supreme Court to have "no bearing" on that issue, and—principally—that "cumulation" of the evidence was improper. Petitioners then challenge the standards for appellate review of the jury verdict. We address these arguments below. Those arguments not addressed have been adequately considered in the original opinion.

B. *The Actual Malice Standard*

The definition of "actual malice" is unmistakably clear: the defamatory falsehood must be made *with knowledge of its falsity or with reckless disregard for the truth. Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). This test is disjunctive, and the panel opinion finds liability most clearly under the "reckless disregard" standard. *Tavoulareas v. Piro*, Nos. 83-1604, 1605, Slip. op. at 16 (D.C. Cir. Apr. 9, 1985). Despite present protestations by petitioners to the contrary, the panel opinion points out that reckless disregard is *not* the general tort concept but involves a substantial *state of mind* inquiry. *See, e.g.*, slip op. at 17 & n.13. The question is whether sufficient evidence was adduced at trial to show that *The Washington Post*, through its reporters and editors, "in fact entertained serious doubts as to the truth of [the] publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). This is essentially a fact-bound inquiry, which was resolved against the *Post* defendants by the jury. Given the wholesale rejection of adverse inferences, and the author's willingness to rely on extravagant speculation to conclude that Tavoulareas' motive in establishing the Mobil-Samarco-Atlas relationship was to benefit his son, it was reasonable for the jury to conclude, as it must have, that the author entertained serious doubts about the truth of the basic charge made by the article.

The defendants' petition represents to this court that "only 'calculated falsehood' is unprotected by the actual malice standard." Petition at 2. This is simply *not* the

law. *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964), stated that both "the knowingly false statement [*i.e.*, calculated falsehood] *and the false statement made with reckless disregard of the truth* [what we have here], do not enjoy constitutional protection." (Emphasis added). *See also Curtis Publishing Co. v. Butts*, 388 U.S. 130, 153 (1967) (Opinion of Harlan, J.) (recovery is permitted where "the publication involved was deliberately falsified, or *published recklessly despite the publisher's awareness of probable falsity*") (emphasis added); *id.* at 164 (Opinion of Warren, C.J.) ("'[A]ctual malice' is not so restrictive that recovery is limited to situations where there is 'knowing falsehood' on the part of the publisher of false and defamatory matter. *'Reckless disregard' for the truth* or falsity, measured by the conduct of the publisher, will also expose him to liability for publishing false material which is injurious to reputation.") (emphasis added).

In *Time, Inc. v. Pape*, 401 U.S. 279, 291 (1971), the Court, quoting *St. Amant, supra*, at 731, returned to its prior opinions which outlined by adjudication the definition of "a reckless publication." *New York Times*, the Court stated, required a finding that "the publisher was aware of the likelihood that he was circulating false information." *Garrison* echoed this necessity for a showing that a false publication be made with "a high degree of awareness of . . . probable falsity." 379 U.S. at 74. *See also St. Amant*, 390 U.S. at 731. And recently in *Herbert v. Lando*, the Court defined the standard as requiring a "subjective awareness of probable falsity." 441 U.S. at 156 (quoting *Gertz*, 418 U.S. 323, 335 n.6 (1974)). In painstaking fashion, this court's opinion detailed the evidence which, true to Supreme Court precedent, supports this definition of liability. Slip op. at 37-84. It is significant, as noted above, that petitioners presently have left untouched three major categories of evidence relevant to our reinstatement of the jury verdict: (1) the Christine Peterson memorandum, which we

found indicated the publisher's "serious doubts"; (2) the reliability of sources (except Comnas, who petitioners presently maintain was reliable[2]); and (3) the "personally dispatched"-Everett Checket conversation.

It is also most important to note that Peterson, the *Post's* copy editor, placed the same interpretation on the article as that set forth in the complaint and accepted by the jury, *i.e.*, that it charged:

> . . . that Tavoulareas alone . . . put together such a scheme for the sake of his son's business career . . . .

(J.A. 2486); slip op. at 39-40. That interpretation was fully supported by the article and by the testimony at trial.

C. *Proof of Actual Malice*

1. The Editorial Process

Petitioners argue that the court's conclusion that the defendants' selection of the most damaging and sensational inferences from the evidence was probative of actual malice is contrary to *Time, Inc. v. Pape*, 401 U.S. 279 (1971). Yet, as we pointed out, *Pape never* said that such choices were irrelevant. The Court in *Pape* was careful to limit its decision to the specific facts of the case, *id.* at 292, upon which the Court ultimately was unwilling to impose liability for what amounted to a single "misstatement," *id.*, or a "malapropism," *Bose Corp. v. Consumers Union of United States, Inc.*, 52 U.S.L.W. at 4521. The present case involves not a single misstatement or malapropism but rather a pattern of construing the underlying events, despite serious doubts about their truthfulness, to support a premature notion of the story,

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[2] Given that the *Post* placed primary reliance on Comnas, it comes as no surprise that the jury refused to credit statements attributed to him when not one word of his testimony was placed into the record.

conceived during the very first interview of a source known to be highly biased and prejudiced.

Petitioners also assert that *Pape* holds "it is beyond the province of any court or jury to consider the editorial 'choices' " that determine the variety of factual "shadings" of a news account. Again, *Pape* neither holds nor suggests so. *Pape* acknowledges that because press reports can contain "an almost infinite variety of shadings," the publisher is often presented with a "set of choices" to be made. 401 U.S. at 286. On the record in *Pape*, the Court concluded that "Time's conduct [omitting the single word "alleged"] reflected at most an error of judgment," and that "*misstatements of this kind*" are protected. *Id.* at 292 (emphasis added). Nowhere does the Court in *Pape* remove review of editorial choices from the province of the judge or jury. Such an extreme position is irreconcilable with the fact that the subjective state of mind is the very essence of the tort.

Petitioners' contentions that judges and juries cannot review a newspaper's editorial decisions are not supported by *Herbert v. Lando*, 441 U.S. 153 (1979). In *Herbert*, a public figure plaintiff sought discovery into the editorial process of the media defendants. The defendants refused to respond "on the ground that the First Amendment protected against inquiry into the state of mind of those who edit, produce, or publish, and into the editorial process." *Id.* at 157. In a clear *rejection* of the claim, the Court reaffirmed that *New York Times* and its progeny make it essential to proving liability that the plaintiff focus on the defendant's conduct and state of mind. The Court flatly refused to adopt the defendants' claim of privilege that would "immunize from inquiry the internal communications occurring during the editorial process and thus place beyond reach what the defendant participants learned or knew as the result of such collegiate conversations or exchanges." *Id.* at 171. In the words of the Court:

> To erect an impenetrable barrier to the plaintiff's use of such evidence [of editorial processes] on his side of the case is a matter of some substance, particularly when defendants themselves are prone to assert their good-faith belief in the truth of their publications, and libel plaintiffs are required to prove knowing or reckless falsehood with "convincing clarity." *New York Times Co. v. Sullivan*, 376 U.S. at 285-286.

441 U.S. at 170 (footnote omitted).

Thus, evidence of the editorial process through which a challenged article passed is *relevant*, indeed almost indispensable, to a defamation plaintiff's case. Petitioners' claim that *New York Times* bars such evidence confuses *relevancy* with the actual malice *standard* of proof, which itself affords protection to media defendants and the First Amendment. That the Court set a high standard of proof does not mean that it also meant to exclude relevant evidence.[3]

2. Other Factors

Petitioners challenge the relevancy of what we held were "other indicia of actual malice." Slip op. at 74.

Knowledge of Harm. The court's opinion finds the petitioners' knowledge of harm likely to befall the plaintiff following publication relevant to the actual malice determination. Petitioners now object that this conclusion

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[3] Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), cited by petitioners, struck down as undue interference with the editorial process a Florida statute granting political candidates a right to reply to editorials critical of them. The case is factually distinguishable and, in any event, inapposite in light of Herbert v. Lando, 441 U.S. 153, 168 (1979) ("[i]t is incredible to believe that the Court in *Columbia Broadcasting System* [412 U.S. 94 (1973)] or in *Tornillo* silently effected a substantial contraction of the rights preserved to defamation plaintiffs in *Sullivan*, *Butts*, and like cases").

contravenes the law of this circuit as enunciated in *Washington Post Co. v. Keogh*, 365 F.2d 965 (1966), *cert. denied*, 385 U.S. 1011 (1967). According to petitioners, the publisher's knowledge of harm "is not probative" of actual malice. What *Keogh* in fact says, however, is that "the seriousness of a charge, *in itself*, is not probative of recklessness." *Id.* at 970 (emphasis added). It is perfectly consistent with *Keogh* to say that such evidence is relevant. Moreover, we find unpersuasive petitioners' suggestion that the Supreme Court's failure to mention this factor indicates that Court's *sub silentio* rejection of it. On its face, the contention that knowledge of harm is irrelevant is absurd. A small amount of support would presumably suffice to render an apparently innocuous statement immune from a finding of actual malice. A reporter's interview with a single unidentified person claiming to have been a witness would be adequate, one supposes, to immunize the statement that Mr. Tavoulareas wore a dark suit and a blue tie at a certain public event. To say that similarly slim support would immunize the statement that Mr. Tavoulareas tried to assassinate the president is to ignore the fact that the requisite degree of care (and hence the existence of recklessness) depends, in this area of tort law as elsewhere, upon the perceived danger of harm.

Lack of Deadline Pressure. This story was not "hot news." That "[a]bsence of *time pressure* . . . is evidence that the jury could fairly consider" is documented extensively in the panel opinion. Slip op. at 75 (emphasis added).

Failure to Retract. Evidence of the *Post's* steadfast refusal to retract was properly considered as bearing on the issue of actual malice. It in no way demonstrates the irrelevance of this evidence to point out, as petitioners do, that it may sometimes demonstrate the *lack* of malice —as showing continued genuine belief in the published account. As we noted in our opinion, slip op. at 76 n.51,

relevant evidence may often point in one direction or the other, depending upon the circumstances—as in a criminal trial ownership of the murder weapon may tend to show guilt or, if the defendant was too clever to use his own weapon and had others readily at hand, may tend to show innocence as well. It is for the jury to decide which conclusion the circumstances justify. In this case the overwhelming evidence showing that the *Post* article was wrong, some of which was brought to the *Post's* attention in a detailed, four-page letter from Tavoulareas and in his subsequent conversation with *Post* management officials, justified the conclusion that the failure to retract displayed a blatant lack of concern for damage wrongfully done to Tavoulareas' reputation—which tends to reinforce the belief that such an attitude permeated the *Post's* treatment of this story from the outset. As petitioners point out, the Supreme Court in *New York Times* decided not to rely on evidence of a failure to retract as proof of actual malice. But that was a fact-specific conclusion, far from enunciating a general rule. 376 U.S. at 286 ("Whether or not a failure to retract may ever constitute such evidence [of actual malice], there are two reasons why it does not here."). It is entirely consistent with *New York Times* that "[u]nder certain circumstances evidence [of a refusal to retract] . . . might be relevant in showing recklessness at the time the statement was published." Restatement (Second) of Torts § 580A comment d (1977).

3. The Cumulative Nature of the Evidence

According to petitioners, the evidence of actual malice does not gain probative force through "cumulation." This is an unreasonable view and is simply not the law.

Our "cumulation" of evidence on the actual malice issue—which petitioners claim worked some new advantage into a libel plaintiff's case—is based on well-settled principles of law. Since *Goldwater v. Ginzburg*, it has been recognized that

> the jurors . . . should consider *all* the evidence concerning [defendants'] acts and conduct in publishing [the piece] in deliberating upon whether the defendants published with actual malice. There is *no* doubt that evidence of negligence, of motive and of intent may be adduced for the purpose of establishing, *by cumulation and by appropriate inferences*, the fact of a defendant's recklessness or of his knowledge of falsity.

414 F.2d 324, 342 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970) (emphasis added) (citing *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967)). And recently in *Bose Corp. v. Consumers Union of United States, Inc.*, the court of appeals reaffirmed this "accumulation" principle, noting:

> A court typically will infer actual malice from objective facts. Oakes, [*Proof of Actual Malice in Defamation Actions: An Unresolved Dilemma*, 7 Hofstra L. Rev. 655, 666-67 (1979)] (quoting *Washington Post Co. v. Keogh*, 365 F.2d 965 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 . . . (1967)). These facts should provide evidence of negligence, motive, and intent *such that an accumulation of the evidence and appropriate inferences supports the existence of actual malice*. . . .

692 F.2d 189, 196 (1st Cir. 1982), *aff'd*, 52 U.S.L.W. 4513 (U.S. Apr. 30, 1984) (emphasis added).

That no piece of evidence in a defamation suit *alone* will support a verdict does not mean that together all the evidence may not be clear and convincing. Pieces to a jigsaw puzzle sometimes appear nothing more than scattered fragments, but when placed together in proper fashion they create a clear picture.

4. Evidence of Pressure The *Post* Placed on Reporters and its Relationship to The *Post's* Investigative Reporting

Petitioners object to what they term "the majority's disparagement of investigative reporting." This claim as

stated raises concern because it is incorrect and misperceives the thrust of that section of the opinion. It thus warrants some extended discussion here.

The focus of this section of the opinion is on the evidence that Assistant Managing Editor Robert Woodward placed excessive *pressure* on reporters to produce high-impact stories. The editor admitted he told his reporters that "you have to have a compulsive need to succeed . . . and to want desperately to *please your boss*." Slip op. at 53 (emphasis added). Evidence was also presented that "the boss" was "looking for something [he] called a holy shit story," slip op. at 52—presumably a story so startling in its revelations as to cause the reader to exclaim in this fashion. We held that the jury was entitled to consider this pressure for shocking exposés in evaluating the state of mind of those responsible for the Tavoulareas story. Thus, the situation was very much like that in *Curtis Publishing Co. v. Butts*, where Justice Harlan, noting the probative effect there of editorial pressures to publish such "high-impact" investigative stories, concluded:

> The Saturday Evening Post was anxious to change its image by instituting a *policy* of "sophisticated muckraking," and the *pressure* to produce a successful exposé might have induced a stretching of standards. In short, the evidence is ample to support a finding of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.

388 U.S. 130, 158 (1967) (Opinion of Harlan, J.) (emphasis added). *See also id.* at 162, 169 (Warren, C.J., concurring in the result).

These excerpts from Supreme Court opinions suffice, if reason alone would not, to demonstrate that managerial pressure to produce sensationalistic stories is relevant to the malice determination and is therefore properly admissible. The *Post's* conviction that such evidence cannot

be considered is apparently a recently acquired one, since extensive examination of Robert Woodward on this subject was admitted at trial *without objection* from the defendant's experienced counsel.

The *Post's* argument seeks to equate our holding on this point with a general disparagement of investigative journalism. The equation is false, unless one thinks that investigative journalism cannot be distinguished from irresponsible sensationalism. Here again, the *Post's* position is a recently adopted one. In the self-criticism which that paper undertook after exposure of the so-called "Jimmy's World" hoax, a series of articles published by the *Post*, within 10 months of the Tavoulareas story, concerning an 8-year-old heroin addict—articles successfully nominated for a Pultizer Prize but later shown to be a fabrication—the *Post* displayed an apparent awareness that a proper zeal for investigative journalism and a distorting pressure for titillating exposés are two different things. The paper wrote:

> The troubling question is whether pressure on the staff distorts the news published in the paper. . . .
>
> Lewis Simons of Metro says: "Pressures are so great to produce, to go beyond excellence to the 'holy s - - -' story. Everyone knows that's what the editors want: The pressure is to get the incredible story, the extraordinary story.
>
> "People want to succeed. They bust their ass to succeed here. . . . It can result in overselling a story . . . ."
>
> . . . .
>
> [S]ome reporters said they felt strongly that the "system" at The Post has editors making demands on reporters that cannot be met. That reporters are made to feel they are failures when they cannot meet those demands. . . .
>
> . . . .
>
> . . . Editors are somewhat infected too. . . .

The Washington Post, Apr. 19, 1981, at A15.

> ". . . [Coleman (city editor)] said he believed the story," Applin-Brownlee recalls now. "I didn't have to ask why. He believed it because he wanted to."

Id. at A13. We note this self-assessment not, of course, to demonstrate that undue pressure likely to produce knowingly false stores existed at the *Post* during the period in question here. That judgment was for the jury, to be made on the basis of the evidence on the point introduced at trial. But the *Post's* assertion of the utter irrelevance of that evidence—and its accompanying accusation that our disagreement is a manifestation of hostility towards investigative journalism—rings particularly hollow beside its own earlier expression of concern regarding the same consequences of the same phenomenon. In its search for the truth of this matter, the jury need no more blind itself to the effects of undue pressure for startling exposés than the *Post* did. And by declining to immunize such undue pressure through the creation of a novel First Amendment rule that this obviously relevant evidence cannot be considered, this court no more shows itself to be an enemy of investigative journalism than did the members of the *Post's* staff who criticized the same excess. In short, it seems to us that it is the *Post*, rather than the opinion of this court, which disparages investigative journalism by equating its pursuit with the pursuit of sensationalism that the evidence here at issue tended to establish.

D. *The Duty of Independent Review*

Petitioners first maintain that our conclusion that our independent judgment need not be applied to each separate fact determination forming the basis for the constitutional fact determination of actual malice conflicts with *Bose's* requirement that we "independent[ly] assess[] . . . the evidence germane to the actual malice determination." 52 U.S.L.W. at 4521 n.31. We found no such conflict.

The question is how deep into the initial fact finding process an appellate court must delve in a libel appeal. We explained in detail that *Bose's* statement that "First Amendment questions on 'constitutional fact' compel this Court's *de novo* review," *id.* at 4519 n.27, must be limited to the *ultimate constitutional fact*, or else all factual determinations in a First Amendment case would be for the court. Slip op. at 26. *This* states the "constitutional responsibility that cannot be delegated to the trier of fact." *Bose*, 52 U.S.L.W. at 4517. Appellate courts are not to examine the evidence of both parties *and then decide which to believe.* For nothing in *New York Times* or *Bose* suggests that we deprive the trier of fact of its opportunity to assess credibility ("the constitutionally-based rule of independent review permits this opportunity to be given its due," *Bose*, 52 U.S.L.W. at 4517; *accord Patton v. Yount*, 52 U.S.L.W. 4896, 4900 (U.S. June 26, 1984)) or that we set aside jury determinations on preliminary factual issues. Indeed, given our appellate posture, which is far removed from the fact finding process, such second-guessing of preliminary evidence would require this court to perform a function for which we are simply unequipped. Thus, it is the *application* of the rule (the constitutional function) rather than the finding of subsidiary facts to which *Bose* primarily speaks. *Bose*, 52 U.S.L.W. at 4517-18 & n.16.

Petitioners argue that, by virtue of our refusal both to make "a general appraisal of the evidence," slip op. at 27, and to evaluate evidentiary inferences in favor of the defendants, slip op. at 79, we "ignored" our duty to review the "whole record." To petitioners it is irrelevant that this case comes to us in a j.n.o.v. posture from a trial court's reversal of a *jury verdict.* They utterly fail to mention that fact, let alone attempt to reconcile the j.n.o.v. posture of this case with our duty to conduct an independent review of the *whole record*—beginning with the facts obviously found by the jury. Petitioners give no indication how they would treat credibility evidence, let

alone how they should, or for that matter *could*, make evidentiary findings concerning subsidiary factual issues. In applying the j.n.o.v. standard, we were required to draw all *reasonable* inferences in favor of the jury verdict. That we have done. To have drawn inferences against the jury verdict, as petitioners suggest, would have engaged this court in the task of *redeciding* purely factual issues and ignoring many credibility findings obviously made by the jury, rather than reviewing the record to determine if the evidence could constitutionally support the verdict. *Time, Inc. v. Pape*, 401 U.S. 279, 284 (1971).

That we grant inferences in favor of the jury verdict does not mean that we did not review the "whole record." Quite the contrary. We reviewed the whole record to assess whether *all* the evidence, taken with the inferences reasonably to be drawn in favor of the jury verdict, was sufficient to satisfy us that the proof was adequate to cross the constitutional threshold. *Bose*, 52 U.S.L.W. at 4520. We were satisfied that it was. Had reasonable inferences from all the evidence not been capable of establishing clear and convincing proof of fault, the judgment of the district court would necessarily have been affirmed.

CONCLUSION

Defamation cases present difficult questions. This case has proven that. Controversies such as this one, however, are decided on their merits, not by reference to statistical studies for appellate reversal of libel verdicts. *See* Petition at 7 n.8. As we have stated, the issue is not whether *we* would have decided the case differently had we sat in the jury box. Rather, it is " 'whether [*all* the evidence in the record] *could* constitutionally support a judgment' for the plaintiff." *Time, Inc. v. Pape*, 401 U.S. 279, 284 (1971) (quoting *New York Times*, 376 U.S. at 284-85) (citations omitted) (emphasis added). We adhere to our conclusion that

> this is a case where the record demonstrates that a properly instructed jury found liability, that clear and convincing evidence supports its verdict so far as liability is concerned, and that it was improper for the trial court to reweigh the jury's findings on credibility and arrive at a judgment n.o.v.

Slip op. at 88.

The Petitions for Rehearing are, by the division, denied.

Order accordingly.

DISSENTING STATEMENT OF JUDGE WRIGHT

I dissented from the panel decision in *Tavoulareas v. Piro*, Nos. 83-1604 & 83-1605 (slip op. April 9, 1985). Since the full court has voted to vacate the panel decision and hear this case *en banc*, I believe it inappropriate to comment further on the merits at this time.

Court of Appeals' Briefing Order

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

Ca. No. 80-02387

FILED Aug. 14, 1985

GEORGE A. FISHER Clerk

No. 83-1604

WILLIAM P. TAVOULAREAS and PETER TAVOULAREAS

v.

PHILIP PIRO
and Consolidated Case No. 83-1605

BEFORE: Robinson, Chief Judge; Wright, Tamm, Wald, Mikva, Edwards, Ginsburg, Scalia and Starr, Circuit Judges; and MacKinnon, Senior Circuit Judge

ORDER

It is ORDERED, by the Court, *en banc, sua sponte,* that parties shall file simultaneous supplemental briefs in the above captioned cases on or before September 9, 1985. Briefs shall not exceed this Court's normal page limitation as set forth in Rule 8(g) of the General Rules of this Court. The parties may address any matter on which they believe

the Court would be aided by further briefing. In addition, counsel are directed to address the following specific issues:

1. Whether, in determining the existence of clear and convincing evidence to suport [sic] a jury finding of actual malice, an appellate court must view the evidence in the light most favorable to the plaintiff?
2. Whether managerial pressure upon reporters to produce sensationalistic stories is a factor that may be considered in the determination of actual malice?
3. Whether William Tavoulareas was a public figure for purposes of the newspaper stories at issue in this case?

Opinion of *En Banc* Court

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1604

WILLIAM P. TAVOULAREAS, APPELLANT

PETER TAVOULAREAS

v.

PHILIP PIRO

No. 83-1605

WILLIAM P. TAVOULAREAS, APPELLANT

PETER TAVOULAREAS

v.

THE WASHINGTON POST COMPANY,
d/b/a The Washington Post,
a Delaware Corporation, *et al.*

Appeals from the United States District Court
for the District of Columbia
(D.C. Civil Actions Nos. 80-2387 & 80-3032)

Argued *En Banc* October 3, 1985

Decided March 13, 1987

John J. Walsh, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

whom *Charles Alan Wright* was on the brief, for appellant. *Abel J. Mattos* entered an appearance for appellant.

Edward Bennett Williams, with whom *David E. Kendall* and *Kevin T. Baine* were on the brief, for appellees The Washington Post Company *et al.*

David Machanic and *Robert A. Feital* were on the brief for appellee Philip Piro.

J. Laurent Scharff, *Jane E. Kirtley*, *James P. Mercurio*, and *Rodney F. Page* were on the brief for *amici curiae* Reporters Committee for Freedom of the Press *et al.* *David Machanic*, *Jack C. Landau*, *Robert B. Bruce*, *Judah Best*, *Loren Kieve*, and *Anthony C. Epstein* entered appearances for these *amici* in support of appellees.

Michael P. McDonald was on the brief for *amicus curiae* The American Legal Foundation in support of appellant.

Floyd Abrams, *Dean Ringel*, *George Freeman*, *W. Terry Maguire*, *Richard M. Schmidt, Jr.*, *R. Bruce Rich*, *Lauren W. Field*, and *Steven A. Bookshester* were on the brief for *amici curiae* American Broadcasting Companies, Inc. *et al.* in support of appellees.

R. Bruce Rich entered an appearance for *amici curiae* American Publishers, Inc. *et al.* in support of appellees.

Before ROBINSON, *Chief Judge*, WALD, MIKVA, EDWARDS, RUTH B. GINSBURG, SCALIA *, and STARR, *Circuit Judges*, and WRIGHT and MACKINNON, *Senior Circuit Judges*.

Opinion for the court filed by *Circuit Judge* STARR and *Senior Circuit Judge* WRIGHT.

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* Judge Scalia joined in the panel opinion and participated in the argument and conference en banc. He subsequently became a Justice of the Supreme Court and as such, is not authorized to continue participation in an en banc case. *See* 28 U.S.C. § 46(c).

Opinion concurring in the judgment filed by *Chief Judge* WALD.

Concurring opinion filed by *Circuit Judge* RUTH B. GINSBURG.

Dissenting opinion filed by *Senior Circuit Judge* MACKINNON.

STARR, *Circuit Judge* and WRIGHT, *Senior Circuit Judge*: William Tavoulareas and his son Peter brought suit for injury to reputation after *The Washington Post* published a story that said, among other things, that Tavoulareas had used his influence as president of Mobil Corporation to "set up" Peter as a partner in a shipping firm whose business included a multi-million dollar management services contract with Mobil. After a jury trial in the United States District Court for the District of Columbia, Judge Oliver Gasch awarded judgment notwithstanding the verdict to the *Post* defendants. 567 F. Supp. 651 (D.D.C. 1983). A divided panel of this court reinstated the jury's verdict, 759 F.2d 90 (D.C. Cir. 1985), but the full court vacated that portion of the panel opinion and set the case for rehearing en banc, 763 F.2d 1472, 1481 (D.C. Cir. 1985).

After a careful review of the entire record in the light most favorable to plaintiff, we are convinced that the only reasonable inference to be drawn is that the "set up" allegation was substantially true. We further hold that Tavoulareas is a limited purpose public figure who can recover for defamation only upon clear and convincing proof that defendants acted with actual malice. Because insufficient evidence exists in the record to support a finding of constitutional malice with respect to any of the defendants, we affirm entirely the District Court's decision.

I. BACKGROUND

At trial, the parties presented conflicting evidence concerning Mobil's and Tavoulareas' involvement with Peter's shipping firm. The following account adopts the

undisputed facts and Tavoulareas' version of disputed events.

A. *Mobil-Samarco-Atlas*

William Tavoulareas was at all relevant times president and chief operating officer of Mobil Corporation, the Nation's second largest oil company and its third largest industrial corporation. In his position at Mobil, Tavoulareas took an active role in the public debate during the 1970's over the manner in which the United States should respond to the rise of OPEC and the ensuing energy crisis. In particular, Tavoulareas vigorously defended the performance of the oil industry against critics who called for sweeping reforms in the structure and management of the industry, and he publicly advocated less governmental regulation of the industry as the solution to the energy shortage. In addition, he was an important proponent of Mobil's "Saudi strategy" of dependence on Arab oil supplies at a time when increasing American energy independence became a significant public policy objective.

In 1973, a group of influential Saudis approached Mobil with a plan for a jointly owned shipping company. The group included the Alirezas, a prominent merchant family in Saudi Arabia that had other business relationships with Mobil.[1] The plan called for Mobil to furnish the capital for the proposed company, which would transport Saudi crude in its ships. At that time, it was widely anticipated that Saudi Arabia would soon establish a preference system requiring that Saudi crude be shipped in Saudi vessels. If Mobil, which depended heavily on Saudi supplies, were forced to use Saudi-owned ships, much of Mobil's own large fleet would then be idled. Mobil initially rejected the offer, whereupon the Saudis found another partner, Fairfield-Maxwell. The resulting venture was called Samarco—the Saudi Maritime Com-

[1] The group also included an inactive member, Crown Prince Fahd's son, Mohammed.

pany. Mobil reassesed its situation in early 1974, reversed its field, and decided to join the Saudi venture.

Under the Samarco arrangement, ships owned by Mobil would be "bareboat-chartered" to Samarco—that is, leased without crews or provisions. Samarco would then "time-charter" the ships back to Mobil with full crews, supplies, and fuel.

Mobil decided that Samarco's ships should be operated by an independent management company, Atlas Maritime Company. Mobil believed that Atlas could operate the ships at less cost than Mobil [2] and that this arrangement would avoid a conflict of interest among the Samarco partners.

Atlas was established by George Comnas in 1974. Comnas met with Tavoulareas in January 1974 and explained that he had just started his own business after leaving his position as managing director of C.M. Lemos & Co., one of the largest Greek shipping concerns. One of Comnas' assistants at Lemos was Tavoluareas' son Peter. Peter, 24 and fresh from business school, was working at his first job in the shipping business as a $14,000 per year employee.[3] Comnas informed Tavoulareas at the January meeting that he, Comnas, wanted Peter to join his new venture as a principal and that Comnas would like to explore the possibility of doing business with Mobil. Tavoulareas then informed Rawleigh Warner, chairman of Mobil's board of directors, and George Birrell, chairman of Mobil's Conflicts of Interest Committee, that Peter might join Comnas in per-

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[2] We observe, however, that this belief was not universally shared. John Kousi, a lawyer who served as a Fairfield-Maxwell executive and as a director of Samarco, called it a "phony argument," and stated that Mobil had the same access to inexpensive Greek crews and the like as Atlas. Transcript (Tr.) at 3081.

[3] Tavoulareas had arranged for Peter to receive training from Mobil for a short period prior to beginning his duties at Lemos.

forming services for Samarco. Soon thereafter, sometime in the spring of 1974, Tavoulareas personally recruited Comnas to manage Samarco's ships through Atlas.

In August 1974, Peter left Lemos to become an equity partner at Atlas. Ares Emmanuel, a more experienced but similarly youthful co-worker from Lemos, had also joined Atlas but was provided with a much smaller equity interest in the firm.[4] When Peter joined Atlas, Tavoulareas sent a memorandum to Paul Wolfe, executive vice-president of Mobil, stating that he "would no longer be involved with anything as to Atlas and Samarco." Record Excepts (RE) at 2440; *see* RE at 2339. Mobil later told the *Post* that "[f]rom the date Peter Tavoulareas joined Atlas, Mr. Tavoulareas divorced himself from involvement in matters involving business transactions between Mobil and/or SAMARCO with Atlas" and that "[t]his is what Mr. Warner reported to [Mobil's] Board." RE at 2344.[5] The undisputed record, however, reveals that Tavoulareas involved himself in Samarco-Atlas matters on numerous occasions after Peter joined Atlas. For example, at trial Tavoulareas admitted that he attended and participated in meetings in Geneva in August 1974 and Saudi Arabia in November 1974 at which substantive discussions took place that helped produce the final agreement between Atlas and Samarco. Tavoulareas conceded that in these meetings he was "representing George Comnas' [and hence Peter's] position," Transcript (Tr.) at 1712, urging the Saudis to accept terms sought by Atlas.

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[4] Peter was given a 25 percent share in Atlas when he joined and that interest was increased to 38 percent a few months later. Emmanuel received a five percent share.

[5] At trial, however, Mr. Warner explained the policy somewhat differently: "[W]e then isolated Tav from the decision-making. Tav could involve himself in activities up to the decision level but he could not make that decision . . . ." Record Excerpts (RE) at 1464; *see also* Tr. at 1553-55, 4136, 4161-62.

As its inaugural project, Atlas began operating two Mobil-owned ships under contract with Samarco at an annual fee of more than $600,000, with the prospect of additional ships in the future. No other bids were solicited or received for the ship-management contract. By the time the *Post* published its story, Atlas had received more than $4.5 million in management fees from Samarco.

Shortly after Atlas began operations, Mobil grew disenchanted with Comnas, although there is disagreement among Tavoulareas' witnesses about whether the dissatisfaction arose from Comnas' business performance or some alleged misconduct on his part. What is undisputed is that Tavoulareas participated in a meeting, held in Tavoulareas' office, at which senior Mobil executives decided to seek Comnas' removal from Atlas. It is also undisputed that Tavoulareas and two other Mobil shipping executives flew to London to notify Comnas of this decision. Comnas was offered and accepted a $30,000 a year, three-year consultancy arrangement with Mobil in return for his resignation from Atlas.

When notified by Mobil of Comnas' resignation, the Saudi partners in Samarco, who had never been enthusiastic about using an independent management company, expressed promptly their view that the Samarco-Atlas management contract was terminated. Tavoulareas personally urged the Samarco partners to retain Atlas and successfully resisted the Saudi partners' attempts to take over some of the departed Comnas' equity interest. Most of that equity soon went to Peter.

After Comnas resigned, Atlas was left without an experienced hand at the helm. Harmon Hoffmann, a senior and highly respected Mobil executive, took over management of Atlas for the next six months, assisting Peter and the latter's fellow Lemos alumnus, Ares Emmanuel. Peter, whose share of Atlas increased from 40 to 75 percent in the wake of Comnas' departure, then assumed

the management duties along with Emmanuel at what had become Peter's shipping firm.[6]

In November 1976, more than two years after Peter joined Atlas and over a year after Peter became its principal owner, Tavoulareas and Warner decided to send a letter to Mobil's quarter-million stockholders informing them that Tavoulareas had not been "actively involved in the planning, negotiation and direction" of Atlas and did "not participate in any decisions regarding the [Samarco-Atlas] relationship because his son, Peter, [was] one of the principals of that marine management firm." RE at 2650. Although Tavoulareas had formally recused himself from such matters, several of Mobil's outside directors raised objections to Peter's involvement in Atlas. Tavoulareas' potential conflict of interest also attracted the attention of the Securities and Exchange Commission, which conducted an investigation into the Mobil-Samarco-Atlas arrangements but took no enforcement action. The House Subcommittee on Energy and Power and several well-known journalists also investigated the matter.

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[6] Peter's and Emmanuel's testimony at trial strongly suggested that they offered (or intended to offer) Hoffmann a *minority* equity interest in Atlas. Peter testified that 25 percent of Atlas' equity "was to be used to bring in people like Hoffman." Tr. at 2602-03. Emmanuel testified that Peter and he "offered Harmon Hoffmann a permanent position . . . and also an equity participation in *our* company." Tr. at 2272 (emphasis added). Tavoulareas himself indicated at trial that Atlas became Emmanuel's and Peter's company upon Comnas' departure, Tr. at 1835, but he also testified that Hoffmann had been offered Comnas' share of Atlas stock, Tr. at 4151; *see also* RE at 2436. At any rate, it is undisputed that Hoffmann rejected any offer to become a part owner of Atlas and returned to Mobil after six months. Tr. at 2273; *see also* RE at 2345 ("We [at Mobil] made H. F. Hoffmann . . . available as an *interim* manager of Atlas.") (emphasis added).

B. *The* Post

On November 30, 1979, the *Post* published a front-page story stating that

> Mobil Oil Corp. president William P. Tavoulareas set up his son five years ago as a partner in a London-based shipping management firm that has since done millions of dollars in business operating Mobil-owned ships under exclusive, no-bid contracts.

The story, which is set forth in full in the Appendix, went on for eighty-five paragraphs to describe the Mobil-Samarco-Atlas arrangements in detail. The article stated, among other things, that Mobil's board of directors had been assured that Tavoulareas "was not involved in his son's venture in any way," but that unidentified sources said that Tavoulareas had nonetheless (1) recruited the shipping executive who set up Atlas; (2) helped negotiate the Samarco-Atlas contract; (3) "personally urged" Comnas to accept Peter as a partner; (4) "played a personal role" in Comnas' resignation; and (5) "dispatched one of his senior shipping executives, Herman [sic] F. Hoffmann, to London to help run Atlas" after Comnas' departure. At key points, the story quoted Tavoulareas' own account of the incidents and included his denials of disputed assertions; in all, more than thirty paragraphs of the article reported Mobil's version of the events in question.

The *Post* first became aware of the connection between Atlas and Mobil in 1976 when reporter Robert Woodward received an anonymous note describing the Samarco arrangement. Woodward made some preliminary inquiries, but for a variety of reasons put the matter aside. In 1979, during a period of rising fuel prices, gasoline lines, and increased interest in the Nation's energy situation, Woodward, by then metropolitan editor of the *Post*, revived the Atlas matter. He assigned it to Patrick Tyler, a relatively new reporter on the metropolitan staff who had written a few months earlier about the oil shortage

(and in a manner which prompted Mobil's disapprobation).

A short time later, Sandy Golden, a reporter for a suburban newspaper who was ambitious for a job on the *Post*, telephoned Woodward to offer a lead he hoped to develop into a story about how the president of Mobil set up his son to be an "overnight millionaire." Upon returning Golden's call on Woodward's behalf, Tyler learned that Golden had encountered Dr. Philip Piro, a young Johns Hopkins physician and estranged son-in-law of Tavoulareas, and that Piro had offered to discuss Tavoulareas' involvement with Peter's rise in the business world. Tyler and Golden met with Piro at The Owl restaurant in Baltimore and interviewed him for several hours. Tyler concluded that Piro had little direct knowledge of Mobil's business affairs, and that he obviously harbored a grudge against the Tavoulareas family. In view of Piro's perceived limited value as a source, Tyler informed Golden that he would continue to pursue the story on his own; Golden said he would do likewise.[7]

Tyler's research led him to George Comnas, who told the reporter that Tavoulareas recruited him to help establish Samarco and Atlas. Comnas also stated that Tavoulareas requested him to bring Peter into Atlas. Comnas described the Samarco-Atlas arrangements in detail and discussed Tavoulareas' role in persuading the Saudi partners to accept Atlas as Samarco's management company. Tavoulareas, according to Comnas, personally asked him to resign from Atlas. Following his own interviews,

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[7] Later, when Golden's inquiries threatened to interfere with the development of the *Post* story, Tyler offered Golden credit as a "special correspondent" if Golden would forego his independent activities. Golden accepted, but took no further part in reporting or preparing the *Post* story. Because of Golden's limited involvement in the ultimate publication, the original panel in this case affirmed the j.n.o.v. for Golden. 759 F.2d at 136-37, 165. The panel's opinion with respect to Golden was upheld by this court en banc. 763 F.2d at 1481.

Tyler learned that Comnas had related substantially the same account to investigators from the House Subcommittee on Energy and Power, who had questioned Comnas in detail and concluded that his story was accurate.

Tyler also interviewed John Kousi, a New York lawyer who served as Fairfield-Maxwell's representative on the Samarco board of directors. Kousi told Tyler that Peter had limited experience and ability, and that, in Kousi's opinion, Peter's partnership in Atlas was "a nepotistic act" on the part of Tavoulareas. Kousi also said that Tavoulareas personally negotiated on Atlas' behalf to obtain the agreement of Samarco's Saudi partners to the Atlas arrangement. Kousi further stated that Mobil was the moving force in both hiring and firing Comnas.

In preparing the article, Tyler sought repeatedly but unsuccessfully to interview Tavoulareas and other Mobil officials. At trial, Mobil officials explained the company's refusal to cooperate with Tyler on the ground that in his story earlier in 1979 Tyler had misrepresented statements by Mobil executives. Eventually, however, at Woodward's urging, Mobil agreed to answer written questions from Tyler. Those answers confirmed the basic outlines of the Samarco arrangement. The responses further stated that, although Mobil's Board of Directors was told that "Tavoulareas divorced himself from involvement in matters involving business transactions between Mobil and/or SAMARCO with Atlas," he had in fact been involved in hiring Comnas and played what Mobil called "a minor role" in firing him. RE at 2344-45. Moreover, Mobil confirmed that Tavoulareas had participated in setting up Atlas as an independent management firm, but stated that he had not initiated Peter's association with Atlas.

Tyler also obtained a transcript of Tavoulareas' sworn testimony before the SEC's Enforcement Division in 1977. In that testimony, Tavoulareas acknowledged his key role in the creation of Atlas. He admitted that he

knew that Comnas and Peter had discussed going into business together when he, Tavoulareas, recruited Comnas. This transcript, together with the interviews of Comnas and Kousi, the report of the Congressional investigators, and the written responses from Mobil, comprised the *Post*'s principal sources for its story of November 30, 1979.

Tyler spent one month working on the story, tracking down leads, confirming information, and writing the final article. The story underwent scrutiny from senior editors, including Woodward and national news editor William Greider. The editors questioned Tyler about his sources. Counsel for the *Post* conducted a line-by-line review. Managing editor Howard Simons and executive editor Benjamin Bradlee examined the story before it was cleared for publication. When a copy editor, Christine Peterson, raised questions about the story, Tyler responded with a detailed memorandum that satisfied the *Post*'s editors that the story was accurate. The *Post* vigorously contends to this day that it published the story in the belief that it was truthful; at oral argument on rehearing en banc, the *Post* reaffirmed its continued belief in the story's accuracy.

William and Peter Tavoulareas brought libel actions against the Washington Post Company, Benjamin Bradlee, Robert Woodward, Patrick Tyler, and Sandy Golden.[8] Plaintiffs claimed they were falsely defamed both by the November 30 article and by a follow-up *Post* story on December 1. The suit against the *Post* was consolidated with a separately filed action brought against Dr. Piro for slander. The District Court subsequently determined that William Tavoulareas was a limited public figure for purposes for the case but that Peter was not. RE at 696-97, 709-29.

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[8] Post Chairman of the Board Katherine Graham was also named in the complaint, but the District Court dismissed her from the action prior to trial, and the plaintiffs did not contest that ruling.

On July 30, 1982, a jury found that Bradlee and Woodward were not liable to either of the plaintiffs and that the *Post*, Tyler, and Golden were not liable to William Tavoulareas for the December 1 article and not liable to Peter for either article. The jury did, however, return a general verdict against the *Post*, Tyler, and Golden for the November 30 article, awarding William Tavoulareas $250,000 in compensatory and $1.8 million in punitive damages. The jury also found Piro liable to both Tavoulareases for slander.

The District Court subsequently entered judgment notwithstanding the verdict (j.n.o.v.) for Piro and for the *Post* defendants against William Tavoulareas. Appeals were then brought to this court challenging the judgments n.o.v. and attacking the trial court's determination that William Tavoulareas was a limited public figure.

II. Public Figure

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court first recognized that traditional actions for defamation might interfere with First Amendment rights of free expression. Discerning in the First Amendment a demand that writers and speakers enjoy enough "breathing space" to avoid self-censorship and encourage "debate on public issues [that is] uninhibited, robust, and wide open," *id.* at 270, the Court held that a public official could recover damages for libel only by showing that the allegedly defamatory statement was made with "'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80. In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), this constitutional protection was applied to speech concerning "public figures" who were not government officials, but who nonetheless "often play an influential role in ordering society." *Id.* at 164 (Warren, C.J., concurring). But in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1973), the Court declined to extend the actual malice rule to speech about private individuals.

Gertz held that the extent of the constitutional privilege varies with the strength of the government's legitimate interest in protecting individual reputation. This interest is strongest when the state protects private citizens whose actions reflect a decision to shield their lives from public scrutiny. Such persons are typically "more vulnerable to injury than public officials and public figures [and] more deserving of recovery." *Id.* at 345. The state's interest is correspondingly weaker with respect to government officials and others who "assume[] [a] role of especial prominence in the affairs of society . . . [that] invite[s] attention and comment." *Id.* This is true partly because public figures "usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Id.* at 344. More important, "by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention," *id* at 342, public figures voluntarily "run[] the risk of closer public scrutiny than might otherwise be the case." *Id.* at 344. Moreover, "[o]ur citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials.'" *Butts*, 388 U.S. at 164. (Warren, C.J., concurring).

The Supreme Court has identified two classes of public figures in addition to government officials: general purpose and limited purpose public figures. "In some instances, an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Gertz*, 418 U.S. at 351.

The extent of the individual's participation in public affairs and assumption of the risk of adverse publicity determines the weight of the government's interest in protecting his or her reputation.

Whether (and to what extent) a person is a public figure is a matter of law for the court to decide. *Rosenblatt v. Baer*, 383 U.S. 75, 88 (1966); *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1293 n.12 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980). This is a difficult and sensitive exercise unsusceptible to the application of rigid or mechanical rules. *See, e.g., Rosanova v. Playboy Enterprises, Inc.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976) ("Defining public figures is much like trying to nail a jellyfish to the wall."), *aff'd*, 580 F.2d 859 (5th Cir. 1978). In this circuit, our determination is guided by *Waldbaum*.

A person becomes a general purpose public figure only if he or she is "a well-known 'celebrity,' his name a 'household word.'" *Waldbaum*, 627 F.2d at 1294. Such persons have knowingly relinquished their anonymity in return for fame, fortune, or influence. They are frequently so famous that they "may be able to transfer their recognition and influence from one field to another." *Id.* at 1294 n.15. Thus, it is reasonable to attribute a public character to all aspects of their lives. William Tavoulareas is a highly prominent individual, especially in business circles, but his celebrity in society at large does not approach that of a well-known athlete or entertainer—apparently the archetypes of the general purpose public figure. *See, e.g.*, [*Johnny*] *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976); *Chuy v. Philadelphia Eagles Football Club*, 431 F. Supp. 254 (D.C. Pa. 1977), *aff'd*, 595 F.2d 1265 (3d Cir. 1979) (en banc). The standard as generally applied is a strict one; the Supreme Court has not found anyone to be a general public figure since *Butts*. In view of the stringent standards applicable to this category of public figure, we have no dif-

ficulty in upholding the District Court's conclusion that the plaintiff was not a general purpose public figure.

Although few persons attain the level of notoriety to be public figures in all contexts, many individuals may be public figures for the more limited purpose of certain issues or situations. *Waldbaum* sets out a three-step inquiry to identify these limited-purpose public figures. First, we isolate the controversy at issue, because the scope of the controversy in which the plaintiff involves himself defines the scope of the public personality. The controversy must be public both in the sense that "persons actually were discussing" it, 626 F.2d at 1297, and that "persons beyond the immediate participants in the dispute [are likely] to feel the impact of its resolution." *Id.* Second, we examine the plaintiff's role in the controversy, to be sure that it is more than "trivial or tangential." *Id.* An individual does not forfeit the full protection of the libel laws merely by stating a position on a controversial issue if he or she is not a principal participant in the debate or is unlikely to have much effect on its resolution. *See Gertz*, 418 U.S. at 167. Finally, we determine if the alleged defamation was germane to the plaintiff's participation in the controversy. *Waldbaum*, 627 F.2d at 1298.

The *Waldbaum* inquiry provides a uniform approach to identifying those individuals whose voluntary participation in public life and whose access to the media have reduced the state's interest in protecting them from the risk of defamation. *Waldbaum* thus provides us with useful analytic tools; nevertheless, the touchstone remains whether an individual has "assumed [a] role[] of especial prominence in the affairs of society . . . [that] invite[s] attention and comment." *Gertz*, 418 U.S. at 345.

Applying these principles to the case at hand, we first consider the possibility that Tavoulareas was a limited public figure for the purpose of the controversy over whether the management and structure of the United

States' private oil industry was in need of alteration or reform. Examining the oil shortages of the 1970's, numerous public officials, pundits, and commentators criticized both the performance and integrity of the major, integrated oil companies. Many reform proposals were publicly advanced and considered, including measures to break up or divest the large oil companies, increase their taxes, install government representatives on their boards of directors, and subject them to more intensive federal regulation.

We have held in *Waldbaum* that "[b]eing an executive within a prominent and influential company does not by itself make one a [limited purpose] public figure." 627 F.2d at 1299. We reaffirm that principle today. But that is not to say that an individual's position as president and chief operating officer of one of the world's largest multinational corporations, with a quarter-million stockholders, is irrelevant to whether that person has "invite[d] attention and comment" with respect to public issues affecting his business dealings. This is especially true when that industry—and the company itself—is at the center of a vigorous public debate touching on a vital national interest.

More specifically, Tavoulareas avowedly attempted to "thrust [Mobil and himself] to the forefront" of the national controversy over the state of the oil industry. In November 1979, for example, Tavoulareas made the following telling observations in a speech:

> As you know, Mobil has gotten the reputation of being probably the most outspoken company on public issues, through our newspaper advocacy advertising and other public statements. It's not always comfortable being in the limelight, particularly when the President of the U.S. calls us perhaps the most irresponsible company in the country. But we think the effort has been worth making and we're going to go on with it. We see positive results in the press and in our meetings with elected officials.

RE at 302; *cf.* RE at 470. Even more than Eric Waldbaum (whom this court, speaking through Judge Tamm, found to be a limited public figure with respect to his business dealings), Tavoulareas was not "merely a boardroom president whose vision was limited to the balance sheet. He became an activist, projecting his own image and that of [Mobil] far beyond the dollars and cents aspects of marketing." 627 F.2d at 1300.

Mobil and Tavoulareas played substantial roles in spearheading a public counterattack on the movement for reform of the oil industry. The 500-page "Public Figure Index"—a collection of news clippings and the like, submitted by the *Post*—attests to the undisputed fact that Tavoulareas was outspoken in defending the oil industry's performance, *see, e.g.*, RE at 455, in blaming the oil crisis on government regulation and interference with the free market, and in advocating rejection of efforts to further regulate or alter the oil industry. He made speeches, testified before Congress, RE at 304-67, published articles, RE at 378-97, and through Mobil's publicity apparatus enjoyed continuing access to the media, RE at 419-63. Even more than his counterparts in the industry, Tavoulareas sought and received public attention on the management and operations of the Nation's oil companies.[9] Having "stepp[ed] into the public spotlight . . . he must take the good with the bad." *Waldbaum*, 627 F.2d at 1294-95.

Public policy toward the oil industry was clearly a controversial subject that "was being debated publicly and . . . had foreseeable and substantial ramifications for non-participants." *Id.* at 1297. Although only a "few

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[9] *Cf. Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979) (noting that Hutchison, held to be a private figure, never participated in debate about public expenditures); *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 168 (1979) (noting that Wolston, a private figure, never participated in debate about Soviet espionage).

[participants] can have the necessary impact," *id.* at 1297 n.27, on such a broadly-defined controversy, Tavoulareas' widely-reported, influential public role in the debate as president of Mobil eminently qualified him as a public figure.

Waldbaum's final requirement, namely germaneness of the publication to the controversy, was also satisfied by the *Post* article. The story of Mobil's president and his junior-executive son, who achieved great business success early in life, sought to provide the public with "a rare glimpse into corporate behavior at the top of one of the largest publicly held international oil companies." ¶ 12. The alleged nepotism by Tavoulareas was not "wholly unrelated" to a public controversy where the credibility and integrity of representatives of the oil industry had become an issue. 627 F.2d at 1298; *see, e.g.*, RE at 570. In our view, the *Waldbaum* criteria are abundantly satisfied here.

In addition, Judge Gasch found Tavoulareas to be a public figure for purposes of a more narrowly defined controversy concerning the Mobil-Samarco-Atlas arrangement. Tavoulareas acknowledges that the *Post* article was germane to that arrangement, but disputes whether it was a "public" controversy within the meaning of *Gertz*, *Waldbaum*, and *Firestone*.[10] Like the District Court, we conclude that it was.

The involvement of Mobil, Tavoulareas, and Peter in the Samarco-Atlas arrangement attracted the attention of journalists and government officials long before the November 30, 1979 article appeared. Mobil publicly announced the Samarco-Atlas deal in 1974, albeit without mentioning Peter's involvement. RE at 629. After consultation with Tavoulareas, Mobil officials subsequently decided to publicize Peter's involvement in the arrangement by releasing the information to a "widely read oil

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[10] *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

industry periodical." Tr. at 1880-81. Thereafter, a number of journalists, including reporters from *The New York Times* and Jack Anderson's office, contacted Mobil about Samarco and Atlas. RE at 1420-22; *see also* RE at 2464; Tr. at 2435.[11]

In light of various inquiries, Tavoulareas, along with Mobil's Chairman Rawleigh Warner, decided to disclose in a letter to Mobil's shareholders that Peter was a principal in Atlas and that, as a result, Tavoulareas had formally recused himself from Samarco-Atlas matters. RE at 2440-42, 2650.[12] In presenting his side of the story to Mobil's shareholders, Tavoulareas reached an audience of more than a quarter-million people, a group larger than the circulation of most daily newspapers.

Shortly after the Mobil shareholder letter, the SEC launched an investigation into Tavoulareas' relationship to Samarco and Atlas. Tavoulareas vigorously defended his conduct in sworn testimony before the SEC staff in March of 1977. RE at 2399-2460. Ten days prior to publication of the *Post* article, Congressman John Dingell, Chairman of the House Subcommittee on Energy and Power, wrote the Chairman of the SEC requesting the Commission to reopen its investigation on the basis of information unearthed by Congressional investigators indicating that "Tavoulareas may have been actively involved in the formation and operation of both Samarco and Atlas, notwithstanding the potential conflict of interest and his denials of participation." RE at 2466.

Not only were "persons actually . . . discussing" the extent and propriety of Tavoulareas involvement in

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[11] According to Tavoulareas, anonymous notes concerning Samarco and Atlas had been circulated to journalists and government officials. Tr. at 1344-46.

[12] Tavoulareas believed that Mobil was under no legal obligation to disclose this information. Tr. at 1882-83; *cf. Firestone*, 424 U.S. at 455.

Samarco-Atlas matters prior to the *Post* article, *Waldbaum*, 627 F.2d at 1297, but "a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution," *id.* (footnote omitted). Highly respected outside members of Mobil's board of directors—including Ambassador George McGhee, Fred Borch, chairman of General Electric, and Albert Williams, president of IBM—specifically objected to the arrangements Mobil's management had made with respect to Peter, and had raised their concerns directly with Mr. Warner. Tr. at 3585-86; *see also* Tr. at 1814-15. Mobil's outside directors were worried that the appearance of a conflict of interest would hurt Mobil's public image and thereby have an adverse impact on Mobil's shareholders. GE's Borch, for example, "urged [Warner] to urge Tavoulareas Sr. to get out of his relationship with his son and put him in a different business. If he wanted to put him in a business, put him in one that does not affect Mobil . . . ." Tr. at 3551. Ambassador McGhee opposed Peter's involvement in Atlas from the outset, expressing the view that the arrangement was "bad policy and precedent for the company" and would "*expose [Tavoulareas and his son] to the risks of possible adverse criticism, even investigations by Congressional committees.*" Tr. at 1795-96 (emphasis added); *see also* RE at 2670. Having opened these matters for public scrutiny by going forward in the face of considered objections by leading businessmen serving on his own board, and then publicizing the affair to the press and to Mobil's shareholders, Tavoulareas could scarcely expect all ensuing commentary on these arrangements to be favorable.[18]

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[18]Admittedly, the *Post* was the first general circulation publication to discuss the most controversial aspect of the Mobil-Samarco-Atlas deal—Peter's participation. We recognize that publications cannot "create their own defense by making the claimant a public figure," *Hutchinson*, 443 U.S. at 135, and that everything that is "newsworthy" is not necessarily a pub-

In sum, we find abundant evidence of the already "public" nature of this subject in the activities of both government and corporate officials. When, in Judge Tamm's words, we "look at the facts, taken as a whole, through the eyes of a reasonable person," *Waldbaum*, 627 F.2d at 1293, we conclude that Tavoulareas was a public figure for purposes of this publication, and that the *Post* was therefore "entitled to act on the assumption that [he] voluntarily exposed [himself] to increased risk" of critical comment and publicity. *Gertz*, 418 U.S. at 345.

III. *Post* DEFENDANTS

It is now well settled that, in the face of the countervailing demands of the First Amendment, a public figure such as Tavoulareas may recover for injury to reputation "only on clear and convincing proof" that the defamatory falsehood was made with "actual malice." *Gertz*, 418 U.S. at 342. It is equally well established that the standard of actual malice requires proof not merely that the defamatory publication was false, but that the defendant either knew the statement to be false or that the defendant "in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *see also Philadelphia Newspapers, Inc. v. Hepps*, 106 S. Ct. 1558, 1567 (1986) (Stevens, J., dissenting) ("For [the actual malice] standard to be met, the publisher must come close to wilfully blinding itself to the falsity of its utterance.") (footnote omitted). Moreover, the burden of proof imposed on public figures is significantly more onerous than the usual preponderance of the evidence standard. *See, e.g., Long*

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lic controversy, *Wolston*, 443 U.S. at 167. But no precedent requires that the first newspaper to report on a *pre-existing public dispute* be held more strictly liable than less resourceful periodicals that hold back and follow its lead. We decline to create such a precedent, which has nothing in law or logic to commend it.

v. Arcell, 618 F.2d 1145, 1148 (5th Cir. 1980), *cert. denied*, 449 U.S. 1083 (1981); *Nader v. De Toledano*, 408 A.2d 31, 49 (D.C. 1979), *cert. denied*, 444 U.S. 1078 (1980). The requirement of "clear and convincing" proof of actual malice, initially articulated by the Supreme Court in *Sullivan*, "administers an extremely powerful antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander." *Gertz*, 418 U.S. at 342.

On the basis of its careful review of the entire record, the District Court concluded that there was not "sufficient evidence in the record from which a jury could reasonably find, by clear and convincing proof, that the [Post] defendants published the November 30 article with actual malice." 567 F. Supp. at 653-64 (footnote omitted). In reaching this decision, Judge Gasch applied the traditional standard for overturning a jury verdict: "A trial court may grant [j.n.o.v.] only when 'the evidence, together with all inferences that can reasonably be drawn therefrom[,] is so one-sided [in favor of the moving party] that reasonable men could not disagree on the verdict.'" *Id.* at 652 (quoting *Vander Zee v. Karabatsos*, 589 F.2d 723, 726 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 962 (1979)).[14] The District Court considered all the evidence in the light most favorable to Tavoulareas and abstained from assessing the credibility of witnesses or weighing the evidence. We follow the same course. Based upon our review of the entire record in this case, we agree with Judge Gasch's dispositive conclusion.

In reaching this conclusion, we apply a standard of review that all the parties, *amici*, and the District Court

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[14] The law of the District of Columbia prescribes substantially the same standard for granting a motion for judgment notwithstanding the verdict. *See, e.g., Washington Welfare Ass'n v. Poindexter*, 479 A.2d 313, 315 (D.C. 1984).

have agreed is correct. Specifically, by virtue of the First Amendment nature of this litigation, the jury verdict must be measured, on the basis of an independent examination, against the heavy burden of proof imposed on a plaintiff who is a public figure:

> In reviewing a defamation verdict, courts must exercise particularly careful review. They "must 'make an independent examination of the whole record,' . . . so as to assure [themselves] that the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times v. Sullivan*, 376 U.S. 254, 285 (1964) (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963)).

Supplemental Brief for Appellant at 9; *see also* Supplemental Brief for Appellees at 6-7; Brief Amicus Curiae of the American Legal Foundation in Support of Appellant at 7; Brief of the Reporters Committee for Freedom of the Press and Radio Television News Directors Association as Amici Curiae in Support of Appellees at 22-23; 567 F. Supp. at 653-54.

The parties, at our instance, have devoted enormous effort to the difficult enterprise of discerning the precise meaning of *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984) (mandating independent judicial review of evidence of actual malice, but leaving unresolved the extent of that review). The District Court was, of course, not faced with this inquiry; the decision granting j.n.o.v. antedated *Bose* by almost exactly one year. From *Bose*, the parties have argued sharply divergent positions. Under one view, *Bose*'s mandate of *de novo* review means precisely that, with no deference at all to be accorded any jury finding germane to actual malice. *See* Supplemental Brief for Appellees at 6-16. Under the contrary view, *Bose* does not alter the traditional rules governing the review of jury verdicts and thus judicial deference is constitutionally mandated to presumed jury findings of underlying facts, evaluations of credibility, and the

drawing of inferences. *See* Supplemental Brief for Appellant at 9-19. Notwithstanding these divergent positions, however, it is undisputed that *Bose* at least reaffirmed *Sullivan*'s mandated duty of independent review. *See, e.g.*, Supplemental Brief for Appellant at 9 ("In *Bose* . . . the Court reaffirmed that 'Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."'") (quoting *Bose*, 466 U.S. at 511).

The somewhat murky dispute that has consumed this litigation in its later phases is whether *Bose* went further and sanctioned independent review as to findings of underlying facts, evaluations of credibility, and the drawing of inferences. It is this issue—the existence and application of this possible additional aspect of *Bose*—that we believe, upon reflection, we need not decide. We have concluded that sailing into these uncharted waters is unnecessary to the proper and principled disposition of this case. Bearing in mind the exacting standard of clear and convincing proof of actual malice, we are persuaded that, when we faithfully apply the traditional j.n.o.v. standards in this First Amendment context, Judge Gasch was manifestly correct.

The dissent complains that we have evaded this complex constitutional issue only by "reject[ing] entirely plausible (if not inevitable) interpretations of the article." Dissent at 2. But in determining what defamatory meaning the article is capable of bearing, we perform the quintessential function of the court in defamation actions, as the dissent forthrightly acknowledges. *See* Dissent at 17 ("It is for the court to determine whether a particular communication is *capable* of bearing a defamatory meaning.") (emphasis in original).

The dissent vehemently insists that we abandon the role of the court and invade the jury's function in up-

holding the District Court's grant of j.n.o.v. The dissent accuses us of "discard[ing] those traditional [j.n.o.v.] standards," by "proceed[ing] to make [our] own assessment of witness credibility" and "disregard[ing] controlling reasonable inferences in favor of the verdict." Dissent at 2-3. These accusations are repeated sporadically throughout our dissenting colleague's opinion. But they are ultimately without foundation. We are satisfied that the District Court did not trench on the jury's function, and we have been mindful ourselves to avoid any such usurpation.

The only example that the dissent presents of our alleged "reassessment" of witness credibility is in our determination that the "set up" allegation is substantially true. *See infra* pp. 40-46. But this allegation fails to recognize that the fact that Tavoulareas "set up" Peter in Atlas—the defamatory sense that we attribute to the article as a matter of law—is clear beyond reasonable dispute. Indeed, as will become evident, we rely on Tavoulareas' *own* testimony and on facts undisputed by him to make this finding.

The dissent's final grievance—that we disregard reasonable inferences drawn by the jury—is also echoed in Chief Judge Wald's concurrence, which notes that "throughout its opinion [the majority] scrutinizes the inferences to be drawn from evidence of actual malice far more rigorously than [the] ordinary judgment n.o.v. standard would permit." Concurring Opinion at 1. Chief Judge Wald suggests that we tackle the knotty constitutional issue regarding what constitutes independent review under *Bose*, so we could properly reach the conclusion as to the absence of actual malice. Both the dissent and the concurrence, with all respect, misapprehend the inquiry we undertake. We consistently grant to Tavoulareas all reasonable inferences that could be drawn from

the evidence, including all issues of witness credibility. As all agree, long before *Bose* and without the benefit of any construction of its unelaborated standard, reviewing courts carefully and independently reviewed findings of fact and rejected jury verdicts when all favorable inferences did not constitute clear and convincing evidence of actual malice. *See Edwards*, 372 U.S. at 235 (court must "make an independent examination of the whole record" in First Amendment cases); *Sullivan*, 376 U.S. at 285 (same, citing *Edwards*); *St. Amant*, 390 U.S. 727 (finding insufficient evidence of actual malice to support jury verdict). That traditional undertaking in defamation jurisprudence is precisely the task before us today.

Accordingly, we have at every turn accepted only undisputed facts or Tavoulareas' version of disputed facts, avoided any evaluations of credibility, and credited all permissible inferences the jury may have drawn favorably to Tavoulareas. Having done so, we nonetheless are constrained to conclude that the evidence is insufficient to constitute clear and convincing evidence of actual malice.

A. *Defamation and Falsity*

1. *Interpretation of the Article*

The theme of the November 30, 1979 article was set forth in its headline and lead sentence: that William Tavoulareas "set up" Peter as a partner in a business managing Mobil-owned ships. Peter, the article reported, had in 1974 been a 24-year-old, $14,000 per year shipping clerk with the Lemos firm, but "with the help of Mobil" five years later owned 45 percent of a newly formed shipping management firm, Atlas Maritime Co. "[T]he overall thrust of the article was that William Tavoulareas improperly set up his son in business and made sure the business would prosper." Reply Brief for Ap-

pellant at 21-22; *see* Brief for Appellant at 70; 567 F. Supp. at 660.

Tavoulareas advances several possible defamatory interpretations of this "set up" allegation.[15] His primary contention, and one adopted by the dissent, Dissent at 24-26, is that "[t]he November 30 article was reasonably understood to mean that plaintiff misused Mobil assets by engineering the *entire* Mobil-Samaro-Atlas arrangement for the benefit of his son, to the detriment of Mobil shareholders."[16] Brief for Appellant at 26 (emphasis

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[15] We note preliminarily that, in his testimony at trial, Tavoulareas indicated that the "set up" allegation was defamatory and false because it wrongly suggested that his *admitted* involvement in Atlas matters was improper. Tr. at 4235-39, 5158-62; *see also* Brief for Appellant at 4. He testified, and the jury reasonably could have found, that Mobil's conflict of interest rules permitted Tavoulareas to "make recommendations" and "negotiate" regarding Atlas so long as he abstained from "mak[ing] decisions." Tr. at 4136, 4162. But, regardless of whether Tavoulareas' conduct squared with Mobil's ethical norms at the time, the First Amendment grants the *Post* the absolute right to express its opinion about the propriety of Tavoulareas' involvement in Atlas' matters. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1973); *Ollman v. Evans*, 750 F.2d 970, 974-75 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985).

[16] The *Post* contends that Tavoulareas' "complaint did not allege such an implication, [that] no such implication was before the jury, and this Court should therefore disregard it." Brief for Appellee at 49. We need not dwell on this threshold argument in light of our conclusion, as discussed below, that the proffered interpretation is unreasonable as a matter of law.

The dissent would go even further and advance a different defamatory meaning, namely that "Tavoulareas misused Mobil assets and his position as president to advance Peter in Atlas." Dissent at 21. To a point, this position seems but a reformulation of Tavoulareas' charge that the article is properly interpreted as suggesting Tavoulareas "set up" the entire arrange-

added). The District Court squarely rejected as un-

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ment for Peter, a charge necessarily implicating a misuse of corporate assets.

But beyond this, the dissent now appears to be suggesting that the article alleges a breach of fiduciary duty and misuse of corporate assets even accepting that the "set up" charge is limited to setting up Peter in Atlas. *See* Dissent at 25 n.27 (characterizing "entire arrangement" as "separately defamatory"). This reading is infected with several fatal problems. For one, this view, which the dissent trumpets as the "central defamatory meaning" of the article, has not been pressed on appeal by Tavoulareas. Rather, as we have noted in text, Tavoulareas urges the "entire arrangement" view. We should have thought it beyond peradventure that an appellate court in a defamation action should refrain from embracing a defamatory interpretation of the underlying article that has not been pursued by the allegedly defamed individual. But even if we address the merits of this argument, we both doubt the plausibility of the new interpretation and, more importantly, quite frankly fail to see what it adds. As to plausibility, we point to the Peterson memorandum, which the dissent champions as a strong, if not definitive, statement of the article's "true" meaning. Peterson, it will be recalled, complained that the story lacked "a dollar-and-cents angle" and asked if "Mobil's shareholders los[t] anything." RE at 2486. Thus, Peterson certainly missed what the dissent views as the article's "central defamatory theme."

Moreover, characterizing Tavoulareas' underlying conduct as misuse of corporate assets, as the dissent would have us do, rather than as nepotism, would seem to change nothing. Both labels refer to the same nucleus of alleged facts, and, as we hold below, those facts are true. Tavoulareas did "set up" Peter in Atlas, and whether one characterizes his activities toward that end as misuse of corporate assets or nepotism is of no consequence. Indeed, the passage of the original panel opinion quoted by the dissent equates misuse of assets with nepotism. *See* Dissent at 25 n.27 (quoting 759 F.2d at 111). As far as we can discern, the dissent's real complaint is that Tavoulareas' actions, although nepotistic, were taken with the intent to benefit Mobil and therefore were not an abuse of corporate position. *See* Dissent at 21 n.23. But as we have already noted, the *Post* has the absolute right to express its opinion on the propriety of Tavoulareas' involvement in Atlas'

tenable that construction of the article. 567 F. Supp. at 660. We agree.[17]

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affairs. *See supra* note 15. Accordingly, because we find no independent substance to the dissent's "central defamatory meaning," we will treat this case as it has been litigated by the parties, *see* Brief of Appellant at 26; Brief of Appellees at 49-51, namely, that the alleged wrongdoing lay in engineering the entire corporate arrangement for Peter's benefit. Therefore, to the extent that specific items from the record are employed by the dissent to buttress its "central defamatory meaning" theory, we will treat them as if they were employed to support Tavoulareas' theory of the case.

[17] We similarly reject Tavoulareas' other interpretation of the "set up" allegation. Specifically, he claims that "[t]he article was quite explicit about what it meant by the 'set up' charge—that plaintiff had personally urged Comnas to bring in his son." Reply Brief for Appellant at 13 n.12; *see* Brief for Appellant at 20. Tavoulareas fails to explain why a reasonable reader would conflate the "set up" allegation with the "personally urged" allegation also contained in the article. The phrase "set up" appears as the key language in both the story's headline and lead sentence; it succinctly expresses the nepotism theme contained in the entire article. In contrast, the "personally urged" allegation first makes its appearance well into the article, in the twenty-third paragraph, along with a number of other factual allegations supporting the general averment that Tavoulareas "was involved personally in several key decisions and actions relating to Atlas." ¶ 20. The article expressly relates—indeed in the very next sentence—that the "personally urged" allegation was denied by Tavoulareas, whereas all the other supporting facts were reported as undisputed. Moreover, Tavoulareas concedes that the truth of the nepotism charge does not depend on whether he had expressly asked Comnas to take Peter in as a partner in Atlas. Tavoulareas and his witnesses testified at trial that his position as president and chief operating officer of Mobil may have inspired Comnas to offer Peter a position in Atlas in the hope that such a favor might secure business from Mobil. *See Tr.* at 1295-96, 1455, 1516, 1648; *cf.* Brief for Appellant at 20. It would be unreasonable, we believe, for a reader to mistake the story's central and unequivocal "set up" allegation for the secondary and expressly equivocal allega-

In a libel case, it is the role of the court to determine whether the challenged statement is "capable of bearing a particular meaning" and whether "that meaning is defamatory." *Restatement (Second) Of Torts* § 614(i), at 311 (1977); *see McBride v. Merrell Dow and Pharmaceuticals, Inc.*, 717 F.2d 1460, 1463 (D.C. Cir. 1983). In making this determination, a court is to consider both the words themselves and the entire context in which the statement occurs. *See Ollman v. Evans*, 750 F.2d 970, 982-83 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985). The jury's proper function, in turn, is to determine whether a statement, held by the court to be capable of a defamatory meaning, was in fact attributed such a meaning by its readers. *Restatement (Second) Of Torts* § 614(2).

The statement that "a father set up his son in business" would ordinarily mean to a reasonable reader that the father provided the son with the means or opportunity by which the latter could assume a position of responsibility in a business venture or commercial firm. *See Webster's Third New International Dictionary* 2079 (unabridged ed. 1981). In our view, when the term "set up" is employed in a familial context, it implies that one family member provided an opportunity to another family member on the basis of kinship, not merit.

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tion that Tavoulareas "personally urged" Comnas to hire Peter.

The dissent suggests that we have embraced a "divide and conquer" strategy in this respect, urging in particular that the "personally urged" statement may have been published with actual malice. Dissent at 35-36 & n.33. For the reasons already stated, we find it impossible under the circumstances here to conclude that, even if false, the statement was published with actual malice where, among other things, Tavoulareas' denial of the charge appeared in the very next statement. Under the well-settled standards described in the text, *see infra* pp. 51-54, this statement falls woefully short of the daunting requirements of actual malice.

Accordingly, we hold that the article, as a matter of law, can reasonably be interpreted as capable of bearing a defamatory meaning, namely that Tavoulareas, as president of Mobil, made it possible for Peter to become a partner in Atlas and then helped to ensure that the business would prosper because Peter was his son. This, in our view, is the normal, everyday reading of the article. The headline and lead sentence, generally reliable indicators of an article's content, clearly convey this meaning.[18] This meaning is defamatory in that it accuses Tavoulareas of nepotism—furthering his son's business career—which might "tend[] to injure [him] in his trade, profession or community standing, or lower him in the estimation of the community." *Afro-American Publishing Co. v. Jaffee*, 366 F.2d 649, 654 (D.C. Cir. 1966) (footnote omitted).

As we have observed, Tavoulareas' proffered interpretation is much broader. He (and the dissent) contend that the article is capable of bearing the interpretation that Tavoulareas "set up" the entire Mobil-Sarmarco-Atlas relationship to benefit Peter. Thus, before passing to a consideration of the falsity *vel non* of the "set up" allegation, we first consider this asserted, much different, broader reading. For the reasons that follow, we reject Tavoulareas' construction and interpret the language according to its common usage. As did Judge Gasch, we hold as a matter of law that the article is incapable of bearing the interpretation Tavoulareas advances.[19]

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[18] *See also* ¶ 4 (Mobil "provided Atlas with office space"); ¶ 5 (Mobil "creat[ed] work for Atlas at a time when the shipping industry was severely depressed"); ¶ 79 (Tavoulareas "intervened" in Atlas after Comnas and Peter had disputes); ¶ 82 ("Tavoulareas dispatched one of his senior shipping executives, Herman [sic] F. Hoffmann, to London to help run Atlas").

[19] *See Washington Post v. Chaloner*, 250 U.S. 290, 293 (1919) ("A publication claimed to be defamatory must be read and construed in the sense in which the reader to whom it

As the District Court correctly observed, the *Post*'s allegation that Tavoulareas "set up" his son in Atlas is entirely different from the claim that the *Post* asserted that the creation of the entire Mobil-Samarco-Atlas relationship was a nepotistic act. 567 F. Supp. at 660 & n.16. The article clearly says the former, not the latter. The article simply will not reasonably bear Tavoulareas' interpretation, as evidenced by his failure to cite anything in the article itself to support this reading. *See* Brief for Appellant at 25-29; Reply Brief for Appellant at 16.[20] Indeed, the article discussed at length Mobil's

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is addressed would ordinarily understand it."); W.P. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on The Law of Torts*, § 111, at 780, 782-83 (5th ed. 1984) ("No mere claim of the plaintiff can add a defamatory meaning where none is apparent from the publication itself . . . and it remains a question for the court whether the meaning claimed might reasonably be conveyed.") (footnote omitted); L. Eldredge, *The Law of Defamation*, § 9, at 4-45 (1978).

[20] The article itself repeatedly refers only to Atlas when discussing Tavoulareas' role: "provide[] Atlas with office space," ¶ 4; "create work for Atlas at a time when the shipping industry was severely depressed," ¶ 5; "force[] the resignation in 1975 of . . . Comnas, who had been recruited a year earlier by Tavoulareas to set up Atlas," ¶ 24; "Tavoulareas dispatched . . . Hoffman to London to help run Atlas," ¶ 82. Passages such as these, focused only on Atlas, in no way suggest that Samarco was created to benefit Peter. When the article does turn to the formation of Samarco, it offers the following discussion:

> "The initial invitation from the Saudis was turned down . . . consistent with our normal policy of providing our own transportation and not permitting preference shipping," Mobil said last week.
>
> But Mobil officials said they subsequently perceived a greater threat from preference shipping. Sources said Mobil then dispatched two negotiators to Jeddah in Saudi Arabia to push Mobil as a partner. One of the negotiators was Mobil's Mideast agent, W. Jack Butler, and the other was the Greek shipping executive, Comnas, who

legitimate business reasons for participating in Samarco, namely its anticipation of Saudi flag preference requirements and favorable Saudi financing. ¶¶ 38-44, 51.

The dissent ignores the specifics of the article, complaining instead that "[t]he entire discussion of the legitimate business reasons in the *Post* article is perjorative." Dissent at 26. In our view, the dissent's reliance on the "tone" of the article is entirely misplaced. The article expressly buttressed the credibility of Mobil's stated business reasons for joining Samarco. The story specifically reports that the other non-Saudi partner in Samarco, Fairfield-Maxwell, joined on the basis of the same "anticipated benefits." ¶ 43. Needless to say, Fairfield-Maxwell had no interest in participating in Samarco to benefit Peter. Rather, as the article itself reported, Fairfield-Maxwell was of the view that Peter's involvement in Atlas, although nepotistic, would not preclude the successful and profitable operation of Samarco. ¶ 27. We cannot accept the dissent's tortured attempt to discern some dark, hidden meaning in the article when the plain words of the piece explicitly rebut that meaning.[21]

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was recruited personally by Tavoulareas to advise Mobil on how to set up an independent shipping concern.

¶¶ 50-51. Surely the reporting of *Mobil's own explanation* for its entry into Samarco, along with the names of Mobil's negotiators with the Saudis, provides not the slightest support for an interpretation that the entire Mobil-Samarco-Atlas arrangement was "set up" for Peter.

[21] The dissent maintains that the words of the article suggest by "innuendo" that the entire Samarco arrangement was crafted by Tavoulareas for Peter's benefit. Dissent at 34. "Innuendo," however, is a common law term of art that refers only to defamatory implications that depend upon the recipient reading in an extraneous fact (the "inducemcnt"). *See Restatement (Second) of Torts* § 563(f). What the dissent really means, it seems, is not that the article's defamatory meaning depends on extrinsic circumstances, but rather that the juxtaposition of facts, nondefamatory and true in themselves, gives rise to the broader defamatory meaning urged

Tavoulareas relies heavily on internal unpublished *Post* memoranda to establish the meaning of the article. This will not do. Nothing in law or common sense supports saddling a libel defendant with civil liability for a defamatory implication nowhere to be found in the published article itself.[22] In addition to the internal memoranda, the dissent cites two other items of extrinsic

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by Tavoulareas. While it cannot be gainsaid that defamation can be subtly implied as well as directly stated, that sensible proposition lacks force where, as here, the charge is direct and straightforward, trumpeted in the opening paragraph ("Mobil Oil Corp. president William P. Tavoulareas set up his son five years ago as a partner in a London-based shipping management firm.") and featured in the story's headline ("Mobil Chief Sets Up Son In Venture"). The thrust of the piece is that Peter was young and inexperienced in the shipping business, and that his meteoric rise to partnership in Atlas was an act of favoritism. That theme appears throughout the article, in chronicling Peter's becoming "an overnight success" and maintaining "a highly affluent lifestyle," ¶ 6; in reporting that the SEC has reopened its investigation into the role Mobil's president played in his son's partnership in Atlas, ¶ 18; in recounting the specific factual allegations of Tavoulareas' personal involvement in matters pertaining to Atlas, ¶¶ 20-26; in recounting Kousi's observation that "[a]t his age, [Peter] wasn't a genius, nor was he terribly experienced in shipping," ¶ 28; in recounting Dr. Piro's comment that Tavoulareas "expressed his interest . . . as 'giving Peter a little nudge to get him along,'" ¶ 29; and in describing Peter's educational and work experience, ¶¶ 30-31. Indeed, the dissent's charge of defamation by "implication," in the face of the straightforward charge of nepotism unabashedly pursued throughout the article, falls prey to the dissent's own oft-repeated criticism of "failing to consider the article as a whole." *See, e.g.*, Dissent at 25.

[22] Even if the cited memoranda were relevant to the pure legal question of whether the article can reasonably be read to convey the alleged implication, we would find them inherently ambiguous and of little probative value. For example, Tavoulareas makes much of Tyler's statement that "[o]ur story does show that Mobil's decisions in this case were not made for the traditional business reasons, or for

evidence as relevant to a determination of the article's meaning.[28] First, much is made of the "public inter-

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the reasons stated by Mobil." RE at 2489. But Tavoulareas fails to note that Tyler also wrote the following: "[T]he story doesn't say that the formation of Atlas and Samarco was a bad business decision that cost Mobil's shareholders money. It doesn't need to say that in order to be a good story. . . . [W]e have essentially said that it was not a big surprise that in the wake of the embargo there would be fear in the oil industry that the Saudis would extend their influence to shipping." RE at 2489-90. It is entirely possible that Tyler's views in the memorandum—expressed in reaction to criticism from another *Post* employee—reflected his own personal views, but not the facts that made it into the November 30 article. *Cf.* RE at 2490 ("[H]opefully we will learn more about all this after we get our initial effort into paper.").

[28] The dissent also contends that our ruling is at war with this court's decision in *McBride v. Merrell Dow and Pharmaceuticals, Inc.*, 717 F.2d 1460 (D.C. Cir. 1983). Not true. *McBride* was a defamation action brought by a doctor who served as an expert witness in a tort suit against a magazine that reported on the trial. In that case, we accepted the contention that one of three allegedly defamatory statements could possibly bear a defamatory meaning; at the same time, we rejected the contention that two others had any defamatory import at all. *McBride* thus concerned the question whether the very different statements at issue in that case could support any defamatory meaning *at all*. The dissent's comparison of *McBride* to the instant case is, in consequence, unhelpful. In this case, we have found the "set up" charge to be defamatory; the dispute is over the sweep of the statement. We reiterate: Let there be not the slightest doubt that we accept the proposition that the "set up" statement defames Tavoulareas by charging him with nepotism. The dissent, in contrast, insists that the statement sweeps more broadly, charging Tavoulareas with setting up the entire Mobil-Samarco-Atlas arrangement solely for Peter's benefit. Thus, the specific holding of *McBride*—that one of three statements could bear some defamatory meaning—does not bear upon, much less resolve, *which* of two defamatory meanings the statement in our case bears.

Moreover, it would twist *McBride* unconscionably to suggest that it stands for the remarkable proposition that courts must

pretation" of the *Post article*. Dissent at 22 n.25. Assuming *arguendo* that such evidence bears on our legal determination, the items earmarked by the dissent are utterly incapable of supporting Tavoulareas' interpretation; if anything, these items support our interpretation of the article.[24] Second, the dissent pounces upon a sin-

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always find a defamatory meaning or, more precisely, embrace the most sweeping defamatory meaning in a challenged statement. Indeed, in accepting the possible defamatory meaning of one of three statements in that case, the court warned that it was "troubled" by such libel suits and did not want its holding to be construed as "license to harass." *Id.* at 1461. We therefore suggested that the District Court "proceed upon remand in a manner that will minimize, so far as practicable, the burden a possibly meritless claim is capable of imposing upon free and vigorous journalism." *Id.* at 1461-62. Thus, both the specific holding and the "general tone," as it were, of *McBride* provide slim support indeed for the dissent's sweeping interpretation of the "set up" charge.

[24] First, the dissent cites a cartoon from the *Service Union Reporter* "depicting William as an indulgent father giving some Mobil ships to Peter 'to play with.'" Dissent at 22 n.25. Although this cartoon clearly suggests that Peter's position in shipping management was nepotistic, it indicates nothing about Samarco. Indeed, it is entirely consistent with the interpretation which we hold to be legally correct. Moreover, this cartoon was accompanied by an article. *See* Plaintiff's Trial Exhibit 551. This *Service Union* article essentially recounts the substance of the two *Post* stories, noting that "William Tavoulareas set up his son five years ago as partner in a London-based shipping-management firm." The *Service Union Reporter* thus clearly supports our interpretation of the November 30 article.

The dissent also points to the trial testimony of a former Commissioner of the Internal Revenue Service. Dissent at 22 n.25. However, nothing in this testimony suggests that the former Commissioner embraced the view that the entire Mobil-Samarco-Atlas arrangement was "set up" for Peter; indeed, nothing in any way indicates he adopted any particular interpretation of the article. The use of the term "corporate incest" adds nothing. The dissent cannot in good conscience twist such a general descriptive phrase into an endorsement of a particular view.

gle passage from the *Post*'s closing argument at trial and attempts by that maneuver to characterize the *Post* as in fact accepting Tavoulareas' interpretation of the article. *See* Dissent at 29-30.[25] This is grasping at straws. From the time the article was published to its appearance before this court en banc, the *Post* has steadfastly interpreted the article as saying that Peter was "set up" in Atlas, not that the entire Mobil-Samarco-Atlas arrangement was set up for Peter.[26] This is hardly surprising, for as we have held as a matter of law, the article is incapable of bearing Tavoulareas' and the dissent's dis-

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[25] The very portion of the *Post*'s closing argument that the dissent quotes specifically states that Tavoulareas had a "good business reason to go into the Samarco venture"; saw "a good business reason to have an independent ship management firm"; and "took advantage of those good business reasons to see to it that his son, Peter, was set up for the rest of his life." Dissent at 29-30 (quoting Tr. 4491-92). This passage certainly seems to be reading the article to say that Peter was set up in Atlas, not that the entire Mobil-Samarco-Atlas arrangement was set up for Peter. The fact that the *Post*'s counsel, in the heat of closing argument, later utters the words "Samarco was set up" in describing the series of transactions that led to the entire arrangement in no way indicates that Samarco was set up *for Peter*. Indeed, in the very same passage, the *Post*'s counsel acknowledges there were "good business reasons to go into the Samarco venture." *Id.* There is thus no departure by the *Post* from its theory of the case at trial, as the dissent would have it. *See* Dissent at 29.

[26] The follow-up story published by the *Post* characterizes the article that is the focus of this lawsuit as "describing the involvement of Mobil's president in setting up his son as a partner in Atlas Maritime Co. and thereafter participating in several key decisions that enhanced his son's position and ensured the firm's success." *Wash. Post*, Dec. 1, 1979, at A3, *reprinted in* Supplemental Brief for Appellees, App. at 14. This same interpretation—that Tavoulareas "set up" Peter in Atlas—has consistently been advanced by the *Post* throughout this litigation. *See, e.g.*, Tr. 133-36 (opening argument); Transcript of Oral Argument at 27 (Feb. 10, 1984) (argument before original panel).

torted interpretation. Because the piece is capable, however, of bearing the narrower but nonetheless defamatory meaning that Tavoulareas "set up" his son in Atlas, we proceed to consider the truth or falsity of this allegation.

Tavoulareas, it should be noted, would pretermit entirely our consideration of truth or falsity, maintaining that the court should not consider the question in reviewing the jury verdict in his favor. Brief for Appellant at 17a-17b. We emphatically disagree.[27] Tavoulareas was required to prove falsity at trial in order to prevail. *Philadelphia Newspapers*, 106 S. Ct. at 1563; *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). Moreover, the defendants never conceded this bedrock element of plaintiff's case; quite to the contrary, they have adamantly maintained throughout these proceedings that the evidence of the story's truth (or substantial truth) precludes any reasonable inference of actual malice. *See* 567 F. Supp. at 654 n.9; Brief for Appellees at 18. In turn, Tavoulareas himself has relied on evidence of falsity in his effort on appeal to establish actual malice, *see, e.g.*, Brief for Appellant at 54, and the District Court found the evidence of the story's truth highly relevant to its

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[27] We also reject Tavoulareas' suggestion that the SEC's decision not to take enforcement action against him precludes us from considering record evidence of the truth of the *Post* story. Brief for Appellant at 17a-17b. The lack of SEC enforcement action does not suggest, much less prove, that the SEC sanctioned his conduct. *Cf. Heckler v. Chaney*, 105 S. Ct. 1649 (1985). For example, the SEC may have let the matter drop only because SEC officials disagreed over whether the Commission's then-existing rules unambiguously required full disclosure of relationships involving children not living in the same household. *See Securities Laws and Corporate Disclosure Regulations, 1982: Hearings Before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce*, 97th Cong., 2d Sess. 261-62 (1982) (testimony of Stanley Sporkin, former Director of SEC Enforcement Division).

decision to grant j.n.o.v. on the issue of actual malice. *See* 567 F. Supp. at 659-61. More fundamentally, the truth or falsity of allegedly defamatory speech must be considered if we are properly to balance the individual interest "in vindicating a reputation that is *wrongly* sullied," Brief for Appellant at 17c (emphasis added), against the community's interest in free speech. *See Philadelphia Newspapers*, 106 S. Ct. 1558. We reject the extravagant suggestion that we ignore evidence of truth in reviewing the reasonableness of the jury's finding that the *Post* article was unprotected by the First Amendment.

2. *The Undisputed Evidence of Truth*

The *undisputed* evidence at trial, including plaintiff's own testimony, precludes any reasonable inference that the central allegation of the challenged article—that Tavoulareas "set up" Peter in Atlas—was false. Tavoulareas repeatedly testified at trial that by December 1973 he knew that Peter's supervisor at Lemos, Comnas, was planning to leave Lemos and form a joint venture company. Tr. at 1275-76, 1293, 1433, 1635, 1647. According to his own testimony, Tavoulareas also knew by late 1973 that Comnas had offered Peter a partnership position in that venture. Tr. at 1293; *see also* Tr. at 1278, 1455.[28] What is more, Tavoulareas testified that he thought it likely that Comnas made the offer to Peter not because of Peter's modest qualifications as a young and inexperienced junior executive but in order "to make sure he got business from Mobil." Tr. at 1648; *see also* Tr. at 1295-96, 1455, 1516; *cf.* Tr. at 1656 (testimony of Tavoulareas that as of 1974 Peter was young and needed more training in shipping business); Tr. at 3080 (uncontradicted testimony of Kousi, a Samarco director, to same effect).

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[28] Tavoulareas also testified that he spoke across the Atlantic by telephone to Peter virtually every day. Tr. at 1463, 1608.

In the spring of 1974, with Tavoulareas fully aware that Comnas was trying to "curry favor" with him by offering Peter a share of Comnas' venture, Tr. at 1516, Tavoulareas flew to London to ask Comnas "if [Comnas] was interested in taking over the management" of Samarco's ships. RE at 2443-46; *see also* RE at 2344-45, Tr. at 1534 ("I [Tavoulareas] more than anybody else was responsible for bringing [Comnas] into [the management of Samarco's ships] . . ."); Tr. at 1289-91, 3423, 3349. *But cf.* Dissent at 37-38 (recounting evidence that Comnas was recruited by Mobil as a corporate entity, including actions of its chairman, Rawleigh Warner, rather than by Tavoulareas, notwithstanding Tavoulareas' own uncontradicted testimony).[29] There-

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[29] Specifically, the dissent enumerates four items of "crucial" evidence that we are charged with omitting. The first body of evidence is employed to suggest that Mobil in the abstract, with Tavoulareas merely executing Mobil's will, was responsible for recruiting Comnas. The dissent reaches this idealized but baseless vision of corporate life at Mobil utterly without regard to Tavoulareas' own testimony. By Tavoulareas' account, it was he, Tavoulareas, Mobil's Mr. Inside and architect of the Saudi strategy, who recruited Comnas, not Mobil's Mr. Outside, Rawleigh Warner, or one of Tavoulareas' underlings. Moreover, the context of the specific statement cited by the dissent, Warner's "absolute natural" exclamation, makes it clear that Warner was merely reacting to Tavoulareas' statement that Mobil was soon to join Samarco and that Comnas was likely to be tapped to manage Samarco's ships, not making a decision on behalf of Mobil to employ Comnas. *See* Tr. at 1514-15. Second, while we credit Warner's general testimony that Tavoulareas did nothing to further Peter's career in Atlas, we also, not surprisingly, accept Tavoulareas' own lengthy testimony as to his own, specific activities on behalf of Atlas, which we recount in the text that follows. *See also supra* p. 41 (quoting Tr. at 1534). In crediting Tavoulareas' own statements we are not, as the dissent accuses, Dissent at 37 n.35, invading the jury's function because we also accept Warner's testimony, which does not contradict Tavoulareas'. Indeed, the four-thousand page transcript admits of one and only one reading—during

upon, Comnas created Atlas to manage Samarco's ships, and Peter—until then an assistant at Lemos—joined Atlas as a part owner. RE at 2421-22, 2426-28; 3141. By itself, the undisputed fact that Tavoulareas *personally* recruited Comnas to manage Samarco's ships (ultimately through the vehicle of Atlas Maritime) shortly after learning that Peter had an outstanding offer from Comnas goes far toward justifying the charge that Tavoulareas "set up" his son in Atlas. *See* 567 F. Supp. at 659 (finding that Tavoulareas' 1977 SEC testimony, describing this sequence of events, "provided Tyler with a sufficient basis for [his set up] allegation").

But that is not all. The record abounds with uncontradicted evidence of nepotism in favor of Peter. The record unmistakably reveals that Tavoulareas remained personally involved in the Samarco-Atlas arrangement after Peter left Lemos and took on his partnership position at Atlas. In August 1974, only days after Peter joined Atlas as a partner, Tavoulareas took Peter—without Comnas—to Geneva to meet the Alirezas. Tr. at

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his tenure at Mobil, Tavoulareas was firmly in control of the affairs of day-to-day management, including the Samarco-Atlas arrangement. The record is crystal clear that Tavoulareas took credit for recruiting Comnas, and not one shred of evidence is to the contrary. As to the third item of evidence, Tavoulareas' testimony that he counselled Peter not to leave Lemos, this fact, which we credit, obviously says nothing about what Tavoulareas did with respect to Peter's future once his 24-year old son, fresh from business school, decided to embark on the venture with George Comnas. There is nothing in logic or common sense to suggest that a dutiful father would not assist his son in a venture even if the son had been counselled not to leave his then-present post. Fourth, the dissent's plaudits concerning Tavoulareas' abiding by Mobil's conflict of interest policies are of dubious validity inasmuch as it is undisputed that Mobil's board was informed that Tavoulareas would not be involved at all with Atlas matters, a representation that was not borne out by subsequent events, as we discuss in due course.

1305-06. This father-and-son trip to Geneva commenced after Tavoulareas "sent a memorandum to Paul Wolf[e] to tell him [Tavoulareas] would no longer be involved with anything as to Atlas and Samarco" and thus to bypass him on all Atlas matters beyond Wolfe's authority in favor of Rawleigh Warner, Mobil's chairman. RE at 2440; *see* RE at 2339; *see also* Tr. at 1332-33, 1464-65; *cf.* RE at 2344 (Mobil's pre-publication letter sent to Tyler claiming that "[f]rom the date Peter Tavoulareas joined Atlas, Mr. Tavoulareas divorced himself from involvement in matters involving business transactions between Mobil and/or SAMARCO with Atlas.") At a luncheon gathering in Geneva, Tavoulareas and a Mobil subordinate engaged in substantive discussions with the Alirezas regarding the tentative Samarco-Atlas contract. During that conversation, Tavoulareas and his Mobil colleague argued in favor of Atlas' position that Atlas should be independent of Samarco and that its compensation should include both a minimum fee and an equity interest in the ships it managed. Tr. at 1712. *See generally* RE at 2587-2590 (Peter's written summary of the meeting). Although the Alirezas were of the view that Samarco should have "clean cut control of the management group[,] . . . [t]his course of action was opposed by . . . Mobil" and Mobil's pro-Atlas position on this fundamental issue prevailed. RE at 2587.

Thereafter, Tavoulareas' personal involvement in building up Atlas, with Peter then an equity partner in the firm, continued unabated. In November 1974, at a social gathering in Saudi Arabia, Tavoulareas attempted to convince Ahmed Alireza to accept Atlas' position on the final sticking point between Samarco and Atlas over the terms of the latter's compensation. Tr. at 1312-13, 1725-27. Based on his conversation with Alireza, Tavoulareas recommended to Comnas and Peter that they accept Alireza's counter-offer. Tr. at 1312-13, 1725-27. Atlas accepted Tavoulareas' advice, and the Samarco-Atlas deal was subsequently consummated.

Having helped Atlas secure its management agreement with Samarco, Tavoulareas then—by his own testimony—personally participated in the series of events whereby Comnas in short order resigned from Atlas, with Peter becoming its 75 percent owner. According to uncontradicted testimony, the decision to discharge Comnas was made in April 1975 [30] at a meeting of high-level Mobil officials in Tavoulareas' own office at Mobil headquarters. Not only was Tavoulareas present for this meeting, but he participated fully in the discussion leading directly to Comnas' removal. Indeed, the meeting commenced with Tavoulareas as the highest ranking Mobil officer present, without Mobil's chairman, Mr. Warner, who only later joined the ongoing conclave. Tr. at 1185-87, 1331-33, 1534.[31] Far from divorcing himself from this matter, Tavoulareas, according to Mr. Warner's uncontradicted testimony, stated in that critical meeting:

> I more than anybody else was responsible for bringing [Comnas] into this and I think that I should be involved in helping to handle the situation.

Tr. at 1534.

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[30] We observe that it was in March 1975 (one month before his Mobil-engineered departure) that Comnas was first informed of Mobil's dissatisfaction with his performance. That visit to the woodshed occurred in a meeting with Tavoulareas and Paul Wolfe. The meeting was held in Tavoulareas' office. Tr. at 1329; *cf.* 567 F. Supp. at 658 (testimony of Lewis Lapham, an outside director of Mobil, that "he did not believe that [Tavoulareas] played a personal role in Atlas").

[31] Although Mr. Warner took the ultimate responsibility for the decision to encourage Comnas to depart, a point emphasized by the dissent, Dissent at 37-38, 40, Warner testified without contradiction that at that April meeting in Tavoulareas' office "every one of us simultaneously and individually reached [the] conclusion [that Comnas had to be removed]." Tr. at 1534. A decision made in Tavoulareas' office with Tavoulareas participating can scarcely be characterized, as the dissent would, Dissent at 40, as non-involvement by Mobil's president in Atlas-related decisionmaking.

A few days later, Tavoulareas flew to London from New York with two Mobil subordinates to explain to Comnas that "we weren't satisfied with [his] services." Tr. at 1333. After one of Tavoulareas' subordinates met with Comnas "to find out what terms he would agree to for leaving," Tr. at 1195, Comnas asked to meet with Tavoulareas. Tr. at 1336-37; *see also* Tr. at 3349. Tavoulareas reviewed a draft agreement of terms for Comnas' departure and then met with Comnas. Tr. at 1336-37. At Mobil's unilateral insistence, made without even notifying or consulting its other partners in Samarco, Comnas left Atlas immediately thereafter. Tr. at 1190.

In addition to the trial testimony of Tavoulareas and his witnesses, Mobil's own answers to Tyler's written questions prior to the article's publication expressly conceded that Tavoulareas personally participated "in the arrangements made when G. Comnas departed from Atlas . . . to the extent of assuring a settlement that was fair and equitable." RE at 2345. It is also beyond dispute that as part of the settlement resulting in Comnas' resignation Mobil agreed to put Comnas on its payroll as a consultant.[82]

Tavoulareas also played a pivotal role in helping Atlas not only to survive but to prosper after Comnas left, when Atlas thereby became the firm of Peter and his youthful colleague from Lemos, Ares Emmanuel. Tr. at 1835; *see also* RE at 2053, 2435. Tavoulareas personally participated in Mobil's internal deliberations that resulted in the decision to make Harmon Hoffmann, a senior and highly respected Mobil executive, available to Atlas as an interim manager. *See* Tr. at 1193, 2848-

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[82] Atlas later reimbursed Mobil for Comnas' salary pursuant to Tavoulareas' decision that Atlas would have to pick up the tab if Comnas failed to perform satisfactorily for Mobil. Tr. at 1340.

49; *cf.* RE at 2345. Furthermore, Tavoulareas was personally and directly involved in persuading the Alirezas to retain Atlas as Samarco's independent management firm upon Comnas' departure. Tavoulareas flew to Saudi Arabia and personally informed the Alirezas of Mobil's discharge of Comnas, Tr. at 3286-88. Subsequently, the Alirezas took the position that the Samarco-Atlas contract was terminated by virtue of Comnas' departure, Tr. at 3292, and that to continue collaboration, Atlas would have to assign partial control of its stock and management to Samarco. Tr. at 3292-93; *see also* Tr. at 1867, 2602, 3441. The Alirezas later withdrew these demands antithetical to Atlas (and Peter) only after Tavoulareas and one of his subordinates flew once again to Jeddah and assured Ahmed Alireza that the Samarco-Atlas contract remained valid, Tr. at 3294, 3298-99, 3302, and that Mobil "would support the needs of [Atlas]." Tr. at 3304.

Given this plentiful, undisputed evidence of Tavoulareas' personal involvement in the establishment and operation of Atlas to Peter's manifest benefit, we conclude that no reasonable jury could, on this record, find that the "set up" allegation was false.[33]

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[33] The dissent does not realistically draw the foregoing facts into question. Rather, our colleague basically resorts to name-calling, accusing us of "mischaracter[izing]" Tavoulareas' undisputed, detailed involvement in Atlas. *See* Dissent at 39. The gravamen of the dissent's complaint in this respect seems to be that Tavoulareas' hands-on approach *vis-a-vis* Atlas was consistent, as the dissent sees it, with Mobil's conflict of interest policy. But that is neither here nor there; the question is whether the *Post* reported the truth when it laid the "set up" charge at Tavoulareas' feet, regardless of whether his multifarious activities concerning Atlas comported with Mobil's internal code of conduct. *See also supra* note 15.

We note that, because plaintiff's proof of falsity was inadequate to sustain a favorable jury verdict under a preponderance of the evidence standard, we need not decide

3. *Other Allegedly Libelous Statements*

Although the central thrust of the story was not proven false at trial, it is still possible that the story contains defamatory falsehoods. *Cf. Afro-American Publishing*, 366 F.2d at 655 ("[T]he defamer may be [all] the more successful when he baits the hook with truth."). *But cf. Restatement (Second) Of Torts* § 581A comment f, at 237 ("Slight inaccuracies of expression are immaterial provided that the defamatory charge is true in substance."). We must, in consequence, carefully consider both the veracity and defamatory character of the three challenged statements in the *Post* article besides the fundamental "set up" charge.[34]

Tavoulareas first seeks to premise liability on statements in the article creating the impression that there was a "direct link between Mobil and Atlas." Brief for Appellant at 25. Given the overwhelming proof at trial of precisely such a link, this argument collapses at the outset. To recap briefly, it is undisputed that Mobil recruited Comnas to form Atlas; that Mobil argued—successfully—in favor of Atlas' position with the other Samarco partners on several critical occasions; that Mobil removed Comnas as head of Atlas without consulting its Samarco partners; and that Mobil made a

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whether public figures are required to show falsity by clear and convincing proof. *Compare Firestone v. Time, Inc.*, 460 F.2d 712, 722-23 (5th Cir.) (Bell, J., specially concurring) (expressing view that clear and convincing proof standard applies to issue of falsity *vel non*), *cert. denied*, 409 U.S. 875 (1972) *with Goldwater v. Ginzburg*, 414 F.2d 324, 341 (2d Cir. 1969) (expressing contrary view), *cert. denied*, 396 U.S. 1049 (1970).

[34] Tavoulareas also points to allegations in the *Post* article regarding possible SEC violations as false and defamatory. But, as the original panel unanimously concluded, those allegations are not properly before us as a basis of liability because they were not specifically pleaded as libelous. 759 F.2d at 127, 150 n.8.

senior Mobil executive available to Atlas as an interim replacement for Comnas. Furthermore, it is beyond cavil that Mobil provided office space and direct financial assistance to Atlas and that Atlas managed the ships that Mobil bareboat chartered to Samarco. *See, e.g.*, Tr. at 1142-48. Thus, even if the *Post* article failed to make clear the formal, corporate relationship between Mobil, Samarco, and Atlas, *but see* ¶¶ 6, 58-59, 74, the defendants cannot in reason and in law be held liable for accurately reporting the direct link that undisputedly did exist between Mobil and Atlas.

Tavoulareas also challenges the allegation at the end of the article that when Comnas left Atlas, Tavoulareas "dispatched one of his senior shipping executives, Herman [sic] F. Hoffmann, to London to help run Atlas." ¶ 82. Tavoulareas does not contest the fact that Mobil indeed sent Hoffmann to London on that very mission. Rather, he contends that the *Post* published a defamatory falsehood by suggesting that he "*personally* ordered a Mobil executive to London to bail out his son's company." Reply Brief for Appellant at 14 (emphasis added). As we have seen, Tavoulareas does not and could not dispute the *Post*'s allegation that he played a *personal* role in arranging Comnas' departure from Atlas. Moreover, the article was also undisputedly correct in reporting that Comnas' removal made it "'natural for Mobil to step forward' . . . 'to maintain quality management of [Samarco's] operations.'" ¶¶ 83-84 (quoting Kousi as well as Mobil's own statement). Nor is it contested, as noted above, that Tavoulareas personally participated in the Mobil discussions in which it was decided that Hoffmann would replace Comnas. Tr. at 1193. Nevertheless, Tavoulareas asserts that the jury could reasonably have found the "dispatch" allegation to be actionable.

Testimony was presented at trial that Paul Wolfe, Tavoulareas' subordinate at Mobil, actually made the decision to dispatch Hoffmann to Atlas. Tr. at 1098,

1440. Thus, viewing as we do the evidence most favorably to plaintiff, the "dispatch" allegation was false to the extent it overstated Tavoulareas' role in Mobil's sending Hoffmann to replace Comnas. The potentially defamatory inference that could be drawn from this falsehood is that Tavoulareas had not recused himself from Atlas matters despite a possible conflict of interest. But we have already held this implication not to be actionable in light of the overwhelming, undisputed evidence of Tavoulareas' personal, continual, and active involvement in Atlas' matters in ways that uncontestably redounded directly to Peter's benefit. Since the only derogatory implication of the dispatch statement is undisputedly correct, it is not actionable. *See, e.g., Herbert v. Lando*, 781 F.2d 298, 312 (2d Cir.) (To hold actionable a "statement whose ultimate defamatory implications are themselves not actionable, we believe, would be a classic case of the tail wagging the dog."), *cert. denied*, 106 S. Ct. 2916 (1986); *Skrock v. Stahl*, 14 Cal. App. 1, 6, 110 P. 957 (1910) ("It was sufficient if the gist or sting of the libelous charge was justified, and immaterial variances and defects of proof upon minor matters are to be disregarded if the substance of the charge be justified."); *Restatement (Second) Of Torts* § 581A comment f, at 237.[35]

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[35] Even if Tavoulareas were falsely defamed by the "dispatch" allegation, the evidence in the record supporting that allegation clearly precludes any inference of actual malice. It was uncontroverted at trial, and not disputed on appeal, that Dr. Piro told Tyler that he had personally heard Tavoulareas tell Mobil vice president Everett Checket "that he had sent Hoffmann over to Atlas after Comnas had left to kind of get it in shape." Tr. at 3720-21. *But cf. infra* note 54 (discussing Checket's failure to recall such a conversation). Tyler was skeptical of Piro as a source in light of his estrangement from the Tavoulareas family, but the article clearly noted both that Piro was a source for the "dispatch" allegation and that he was estranged from the Tavoulareas family. Moreover, Tyler did not rely solely upon Piro; indeed,

Third, and finally, plaintiff vigorously contests the article's assertion that he "personally urged" Comnas to accept Peter as a partner in Atlas. ¶¶ 23, 52. The jury reasonably could have concluded that this charge, communicated to Tyler by Comnas, was false. *See* Tr. at 1293-94, 1296-97, 1425, 1433. And, because the "personally urged" allegation goes beyond the general charge that Tavoulareas "set up" his son and suggests that Tavoulareas actively pressured Comnas to hire Peter rather than merely rewarded Comnas for doing Peter a favor, *see supra* note 17, the jury may reasonably have found that this specific allegation carries with it an independent defamatory implication capable of causing a separate harm to plaintiff's reputation. We thus turn to the issue of actual malice.

B. *Actual Malice*

In this branch of our inquiry, the issue is whether the *Post* defendants published the "personally urged" statement with actual malice—that is, with knowledge of falsity or reckless disregard for its truth. This, in particular, calls upon us to determine whether there is *clear and convincing* evidence "to permit the conclusion that the defendant[s] in fact entertained serious doubt as to the truth of [their] publication." *St. Amant*, 390

Mobil itself gave the *Post* reason to believe Piro's eyewitness account of Tavoulareas' alleged statement to Checket. Mobil's prepublication letter to Tyler admitted that "Mr. Tavoulareas played a personal role in arranging [Comnas'] departure" and suggested that Tavoulareas was similarly involved in the ensuing decision to send Hoffmann to Atlas. RE at 2341, 2345. And, as we have noted, Tyler had abundant evidence before him that Tavoulareas often played a prominent role in Atlas matters. There can be no doubt that the *Post*'s description of Hoffman's dispatch was " 'one of a number of possible rational interpretations' of an event 'that bristled with ambiguities' and descriptive challenges for the writer." *Bose*, 466 U.S. at 512 (quoting *Time, Inc. v. Pape*, 402 U.S. 279, 290 (1971)).

U.S. at 731.[36] The "serious doubt" inquiry enunciated by the Supreme Court is too fact-bound to be resolved on the basis of any single factor or mechanical test. *Id.* at 730. Nevertheless, as the Supreme Court has clearly stated, courts may not abdicate to triers of fact the responsibility for developing the contours of the actual malice rule. Instead, courts are obligated to conduct "an independent examination of the whole record." *Edwards*, 372 U.S. at 235; *see also Sullivan*, 376 U.S. at 285. Thus, a substantial body of law has developed over the past two decades applying and delimiting the "serious doubt" standard first articulated by the Court, speaking through Justice White, in *St. Amant*. The jury verdict must be squared not only with the literal formulation of the actual malice rule but examined in the light of case law that has "marked out" the outer limits of constitutionally permissible libel verdicts for public figures. *St. Amant*, 390 U.S. at 730.

1. *Legal Standards*

It is well established that the "serious doubt" standard requires a showing of subjective doubts by the defendant. It does not turn on whether a reasonably prudent person would have published under the circumstances. *Id.* at 731. The rejection of an objective standard of care, however, does not mean that libel defendants can defame with impunity merely by testifying that they published the challenged statements with the belief that they were true. *Id.* at 732. To the contrary, a plaintiff may prove the defendant's subjective state of mind through the cumulation of circumstantial evidence, as well as through direct evidence. *See, e.g., Herbert v. Lando*, 441 U.S. 153, 160 (1979); *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967).

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[36] We examine the reasonableness of the jury verdict in light of the "serious doubt" test, which imposes a less onerous burden on defamation plaintiffs than the other, disjunctive prong of the actual malice standard, knowledge of falsity.

At the same time, actual malice does not automatically become a question for the jury whenever the plaintiff introduces pieces of circumstantial evidence tending to show that the defendant published in bad faith. Such an approach would be inadequate to ensure correct application of both the actual malice standard and the requirement of clear and convincing evidence. Thus, as all parties and *amici* agree, the Supreme Court has directed us to "exercise particularly careful review," Supplemental Brief for Appellant at 9, and to "make an independent examination of the whole record." *Edwards*, 372 U.S. at 235, *quoted in Sullivan*, 376 U.S. at 285.[37]

This constitutionally mandated duty of independent review has been applied unflinchingly. The Supreme Court and other courts have more often than not concluded that public figure libel plaintiffs failed to adduce evidence of sufficient clarity to convincingly support a jury finding of actual malice. For example, in the leading case of *St. Amant v. Thompson*, 390 U.S. 727, the Supreme Court reversed a jury finding of liability in a

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[37] Contrary to Chief Judge Wald's charge in her concurring opinion, *see* Concurring Opinion at 4-5, we conduct the requisite *independent review* in this case without relying on *Bose* to permit a greater intrusion into the jury function than would ordinarily be permissible under traditional j.n.o.v. standards *in defamation cases*. The "rigorous scrutiny" that Chief Judge Wald detects in our analysis, *see id.* at 1, derives not from an application of some possible additional and more intrusive form of independent review sanctioned by *Bose*, but from an application of both the settled and universally accepted principle of careful appellate review in defamation cases, *see Sullivan*, 376 U.S. 254, *St. Amant*, 390 U.S. 727, and the exacting requirement of clear and convincing evidence. Thus, the rigorous scrutiny we have used, derived as it is from *Sullivan* itself, as well as *St. Amant*, existed long before *Bose* and the ensuing dispute over its interpretation. We have been careful throughout to unswervingly apply the *Sullivan-St. Amant* standard, nothing more, nothing less.

public official's defamation action. Because of *St. Amant*'s importance in actual malice analysis, we pause to recall the facts of that case. Briefly stated, Deputy Sheriff Thompson sued St. Amant, a candidate for public office, for repeating in the course of a televised speech the false allegation that Sheriff Thompson had taken bribes from a local Teamsters Union president. The record showed that St. Amant had based his allegation exclusively on information provided by an active member of a dissident faction within the Teamsters. At the time, the dissident faction was locked in a struggle for control against the faction led by the Teamsters' official alleged to have paid bribes to the Sheriff. Although he had no knowledge of the source's reputation for veracity, St. Amant failed to investigate independently the obviously serious charge of bribery and failed to seek confirmation of the information from others who might have known the facts. Notwithstanding this evidence, the Supreme Court found the record insufficient to support a finding of actual malice.

Before evaluating the specific record before it, the *St. Amant* Court provided examples of the kind of proof that would likely support a finding of actual malice. The examples fell into three general categories: evidence establishing that the story was (1) "fabricated"; (2) "so inherently improbable that only a reckless man would have put [it] in circulation"; or (3) "based wholly on an unverified anonymous telephone call" or some other source that the defendant had "obvious reasons to doubt." 390 U.S. at 732. After setting forth these illustrative examples, the Court held that the evidence before it, by comparison, was clearly inadequate. St. Amant's failure to investigate was deemed not indicative of actual malice, inasmuch as the plaintiff had not proven "a low community assessment of [the source's] trustworthiness or unsatisfactory experience with him by St. Amant." *Id.* at 733. The Court also found support for its decision in evidence tending to show that St. Amant published

the charge in good faith, including St. Amant's testimony that he had verified other aspects of his source's information and evidence that the source had sworn to his answers in the presence of newsmen.

2. *Application of the Legal Standards*

As the District Court correctly observed in the case at hand, the Supreme Court's reasoning and result in *St. Amant* are instructive for inferior tribunals in attempting faithfully to apply the "serious doubt" test. 567 F. Supp. at 656. The examples provided there of when a jury may reasonably infer actual malice from circumstantial evidence are by no means exhaustive, but, as numerous courts have recognized, constitute useful benchmarks for lower courts to employ in determining whether a record is sufficient to sustain a finding of constitutional malice. *See, e.g., Marcone v. Penthouse International Magazine For Men*, 754 F.2d 1072, 1089-90 (3d Cir.), *cert. denied*, 106 S. Ct. 182 (1985); *Hunt v. Liberty Lobby*, 720 F.2d 631, 643-46 (11th Cir. 1983). When the entire record in this case is scrutinized in light of *St. Amant* and other governing precedents, it is clear beyond cavil that Judge Gasch's decision to grant j.n.o.v. was fully justified.

Tavoulareas seeks to support the jury finding of actual malice on the basis of both evidence generic to the entire article, such as managerial pressure to produce stories, and evidence relating more specifically to various statements in the article. We turn first to the evidence of actual malice relating to the single remaining statement in the article that may be actionable.

a. *"Personally Urged."* It is undisputed that Comnas was the sole source for the *Post*'s allegation that Tavoulareas "personally urged" that Peter be included as an equity partner in Atlas. Plaintiff contends that reliance on Comnas was evidence of the *Post* defendants' actual malice inasmuch as the record supports the conclusion

that Comnas was an obviously unreliable source. Our examination of the record, however, leads us to agree completely with the District Court's contrary conclusion that "reliance upon George Comnas as a primary source does not come close to approaching the level of recklessness required by the Supreme Court." 567 F. Supp. at 656.

As did the District Court, we find it highly significant that "much of Comnas' information was independently verified by other sources whose credibility even the plaintiff does not now challenge." 567 F. Supp. at 656. For instance, Comnas told Tyler that Tavoulareas had participated on Atlas' behalf in key negotiations with the Saudi partners of Samarco *after* Peter had joined Atlas. Tr. at 3688, 3778-84. Mobil denied this critical contention in its pre-publication letter to the *Post*, claiming (erroneously, as Tavoulareas conceded at trial, Tr. at 4161-62) that "[f]rom the date Peter Tavoulareas joined Atlas, Mr. Tavoulareas divorced himself from involvement in matters involving business transactions between Mobil and/or SAMARCO with Atlas." RE at 2344. Tyler published Comnas' charge only after receiving independent confirmation from Kousi, Tr. at 3083-3100, a highly respected, knowledgeable member of the Samarco board with firsthand knowledge of Atlas' formation and engagement as Samarco's management firm. The only reasonable inference is that Tyler was justified in considering Kousi's confirmation of Comnas' statements important evidence of the latter's reliability. Tr. at 785-86, 3689, 3792.

But this was by no means all the information in Tyler's hands that buttressed Comnas' statements. Tavoulareas' own testimony before the SEC staff admitted his recruitment of Comnas to head Atlas and his knowledge of Comnas' business relationship with Peter. RE at 2443-46, 2424-25. On behalf of Mobil, Paul Wolfe confirmed Comnas' statement to Tyler that Tavoulareas

was personally involved in Comnas' departure from Atlas, RE at 2345, a significant admission in light of the understanding communicated by Mobil to Tyler and outside members of the board of directors that Tavoulareas was not involved in Atlas matters after Peter's entry into the firm. Tr. at 3550, 3588-89; RE at 2344. Moreover, Kousi confirmed Comnas' general charge that Peter obtained his position with Atlas on the basis of kinship, not merit. Tr. at 3079-80 ("[T]he employment of Peter Tavoulareas in Atlas was a nepotistic act."). In sum, the undisputed evidence of record shows conclusively that Tyler corroborated *much* of the information provided by Comnas. *Cf. St. Amant*, 390 U.S. at 733 (verification of part of source's information probative of St. Amant's lack of actual malice in relying on source for other, uncorroborated information).

Besides independent, reliable corroboration of most of Comnas' story, Tyler had other, substantial reasons to believe Comnas. Of these, the most important was Tyler's uncontroverted knowledge that "Comnas provided virtually the same information to Tyler as he gave to investigators for the House Subcommittee," 567 F. Supp. at 656, including the substance of the "personally urged" allegation. RE at 2471; *cf. St. Amant*, 390 U.S. at 733 (St. Amant's knowledge that source repeated information to others in manner bespeaking earnestness indicative of good-faith belief in source's credibility). It is undisputed that an experienced House Subcommittee investigator, Peter Stockton, accompanied by a Subcommittee lawyer, traveled from Washington to Comnas' home in Osterville, Massachusetts. Tr. at 2770; RE at 2467. There, they conducted a formal three-hour interview, complete with elaborate notetaking; it is undisputed, moreover, that the two Subcommittee staff members were interviewing Comnas in their official capacities. This was a Congressional investigation, not an idle conversation between a passerby and a disgruntled executive.

After interviewing Comnas, Stockton confirmed Tyler's judgment that Comnas was credible, that he spoke reluctantly and carefully for fear of reprisal, and that his information was consistent with that provided by other sources. Tr. at 2816-17; *cf.* Tr. at 2792-93. Tyler was justifiably impressed with Comnas' "consistency" as a source, especially since, as Tyler reasonably concluded, Comnas was on "a higher level of notice" that "he better be truthful in his story" when speaking to the Subcommittee staff. Tr. at 3823-24.[38]

Tyler also knew that Comnas had enjoyed a long and successful career at Exxon where he eventually became president of Esso Mediterranean and Esso Africa.[39] Tyler was further aware that, after leaving Exxon, Comnas had been entrusted to run the principal office of one of the largest Greek shippers (Lemos) and had been recruited by Mobil in early 1974 based upon Mobil officials' "long personal acquaintances with G. Comnas." RE at 2345; *see also* RE at 2446. As the District Court observed, Comnas "obviously had a substantial business career and reputation that could be damaged if he lied."

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[38] At trial, plaintiffs attacked Tyler for crediting the Subcommittee staff interview since Comnas was not placed under oath. But there is not a shred of evidence that that factor gave Tyler or the *Post* editors any pause, nor can we divine why a reasonable jury would infer that it did. *Cf.* Tr. at 3958; 18 U.S.C. § 1001 (generally prohibiting false statements to the Government). Plaintiffs had every opportunity to cross-examine Stockton and took advantage of that opportunity, but did not even attempt to establish that the procedure of conducting an interview *sans* oath was unorthodox or inconsistent with the Subcommittee's customary procedures.

[39] Kousi testified that he once heard a "reference" to Comnas "having been involved in a scandal in Italy" concerning overpricing for crude oil when Comnas worked for Exxon, but he could not remember who made the "reference" or what Comnas was alleged to have done. Tr. at 3176, 3177. Moreover, Kousi never testified that he told Tyler of this rumor.

567 F. Supp. at 656; *see* Tr. at 637-38, 3690, 3825.[40] Moreover, it is undisputed that no Mobil representatives ever gave Tyler the slightest indication that Mobil questioned Comnas' credibility or ethics.

Despite the abundant, undisputed evidence in the record supporting Tyler's decision to credit Comnas' story, Tavoulareas nevertheless argues that the jury could reasonably have concluded that "Comnas' patent lack of credibility" was apparent to Tyler. Brief for Appellant at 20. To support this contention, Tavoulareas relies heavily on the undisputed fact that Dr. Piro told Tyler that "Comnas had been caught in some fraud involving Atlas" and that the Tavoulareases had threatened to report Comnas to the tax authorities if Comnas ever started any trouble for Peter and Atlas. Tr. at 2908-09. What Piro related, of course, was his understanding from the Tavoulareases. Tr. at 2958, 2965.[41]

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[40] Although Tyler had been told by Kousi that Comnas' management of Atlas "wasn't as good as [his] credentials said he would be" and that Comnas turned out to be a "mistake," Tr. at 850, he was also aware that Comnas had been retained by Mobil as a consultant after he left Atlas.

[41] The dissent argues that the *Post* "*knew* that Comnas was not trustworthy" because "Piro had told Tyler of previous fraudulent scandals in which Comnas was involved." Dissent at 41 (emphasis in original). But in virtually the next breath, the dissent concludes that Piro is "unknowledgeable" and "ignorant." *Id.* at 50-51. We cannot help observing that the dissent thus places itself in the anomalous position of contending that it was indicative of actual malice for the *Post not* to rely on an "unknowledgeable" source. The dissent compounds its error by blithely ignoring the specific indicia of Comnas' reliability—*based on uncontroverted evidence in the record*—which were before Tyler in preparing the article, not the least of which was Tavoulareas' own testimony before the SEC. *See supra* pp. 55-57. The dissent also chooses to ignore Mobil's own prepublication silence about the supposedly dark character of Comnas, which is all the more odd in light of Mobil—*through Tavoulareas*—and Comnas having been business bedfellows *after* Comnas' Exxon *contretemps*.

Tyler, as we have seen, tried to talk with both William and Peter Tavoulareas. William refused to talk at all with Tyler, but his sworn SEC testimony indicated that Comnas' withdrawal from Atlas had nothing whatever to do with unethical conduct. RE at 2435. Peter hung up the phone when Tyler called, having chosen, as he was free to do, not to enlighten Tyler as to the reasons for Comnas' departure from Atlas or to correct any misinformation Tyler had concerning Comnas' trustworthiness. Tr. at 2437. Mobil, of course, steadfastly refused Tyler's requests for interviews, as it was likewise free to do. Faced with Mobil's silence, Tyler checked with Kousi, who told him that it was the "dissatisfaction of Mobil," not any of the other parties, that led to Comnas' removal. Tr. at 3082-83; *cf.* Tr. at 2099-2100 (testimony of Harmon Hoffmann that the sole reason for Comnas' removal was dissatisfaction with his performance, not any ethical considerations). Thus, the undisputed record comports entirely with the District Court's conclusion that "it is not at all clear that Comnas left Atlas under circumstances that should have aroused Tyler's suspicions as to his motivation for speaking unfavorably about the [Tavoulareases]." 567 F. Supp. at 657 (footnote omitted).

We also agree with the District Court that the evidence of personal animus between Comnas and Tavoulareas was not indicative of the defendants' actual malice in view of their independent corroboration of Comnas' information and the other evidence in the hands of the *Post* defendants of Comnas' knowledge and credibility. *Cf. St. Amant*, 390 U.S. at 733 (reliance on a source locked in a fierce struggle with union officials closely allied to Sheriff Thompson did not permit an inference of actual malice when St. Amant had "verified other aspects" of the source's information and had other indicia of the source's credibility).

Finally, we reject the suggestion that the *Post*'s failure to introduce any of Comnas' deposition testimony at

trial was probative of actual malice. Even assuming that Tavoulareas can advance this assertion in the first instance,[42] Comnas was deposed for four days by both sides, yet neither side ultimately elected to introduce his testimony into the trial record. Since Comnas' deposition transcript was "equally available," the decision of both sides not to use it cannot serve as the basis for an adverse inference against the *Post*. *Brown v. United States*, 414 F.2d 1165, 1166-67 (D.C. Cir. 1969); *see also United States v. Young*, 463 F.2d 934, 939-40 (D.C. Cir. 1972); Tr. at 3817.

b. *General Evidence of Actual Malice.* Last, we consider the more general evidence in the record that, as Tavoulareas sees it, supports a determination that the *Post* defendants published the November 30 article with actual malice. At the outset, we observe that our examination of this evidence cannot be divorced from our earlier conclusion that the record before us cannot reasonably support a finding that the central theme of the article was false. For example, Tavoulareas argues that the *Post*'s refusal to retract the article or to concede its falsity at trial was evidence of actual malice in view of "the overwhelming proof of the article's falsity at trial." Brief for Appellant at 27. But this broadside cannot stand in light of our earlier analysis and conclusions with respect to the issue of falsity *vel non*. We therefore need only address briefly to what extent, if any, this evidence could reasonably have supported the jury finding of actual malice.

(i) *The Christine Peterson Memorandum.* Christine Peterson had the task of performing the final edit on the November 30 article. During Peterson's brief testimony

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[42] Both Tavoulareas and the dissent, in complaining about the *Post*'s failure to introduce Comnas' deposition, refuse to acknowledge that at trial Tavoulareas took the position that Comnas' deposition should be excluded from evidence because it was incomplete due to objections interposed by Congressional counsel. Tr. at 3729.

at trial, it was established that her duties included editing the story for "style, punctuation, [and] grammar," confirming facts that could be checked with source material at hand, and writing the headlines. Tr. at 2827. The record is also clear that in editing the article at issue, she performed a "fresh read," that is, she had no knowledge of the sources or research underlying the article beyond what she read in the article itself. *See* Tr. at 2829; RE at 2486-87; 567 F. Supp. at 655. After editing the copy, and prior to publication, she sent a memorandum to assignment editor Peter Milius. The memorandum stated in part:

> I've read the Mobil story several times, and while I'm impressed with the amount of work the reporter obviously did, I'm still left with an overwhelming sense of So What? Is there any way to give this story of high-level nepotism a dollars-and-cents angle? Did Mobil's shareholders lose anything? Mobil's customers? Parts of Tyler's case against Tavoulareas seem tenuous, and the whole—a $680,000-a-year plaything for an indulged son, at worst—just seems like a withered peanut in an 84" gilded shell. A far more interesting angle, it seems to me, is Mobil's concern about Saudi preference shipping—a concern so profound that it led to the formation of an entire dummy corporation. It's impossible to believe that Tavoulareas alone could put together such a scheme for the sake of his son's business career, or that he would want to.

RE at 2486.

At trial, Peterson testified that "my point in the memorandum was that I thought the formation of Samarco was a more interesting angle in the story." Tr. at 2833. It was, as she put it, the seemingly unusual corporate arrangements that provided "a more important angle for the story to have as a lead." Tr. at 2834. In order to credit all permissible inferences that the jury may have drawn, we reject Peterson's trial testimony and accept Tavoulareas' proffered inference. Tavou-

lareas contends that the Peterson memorandum entitled the jury "to find that an editor of the *Post* charged with the final review of the story before publication had indeed found . . . the story's theme impossible to believe" and brought home this doubt to those responsible for the article's publication. Brief for Appellant at 35. We accept this view—that the Peterson memorandum is evidence of "serious doubt" or actual malice. But defamation plaintiffs cannot show actual malice in the abstract; they must demonstrate actual malice *in conjunction* with a false defamatory statement. Upon closer examination, the Peterson memorandum does not qualify as such a showing and thus fails to constitute acceptable evidence of actual malice. It certainly falls short of clear and convincing evidence.[43]

The Peterson document is subject to two reasonable interpretations when construed against the *Post*, both of which fail to connect Peterson's disbelief to a false and defamatory meaning present in the article. First, Peterson's memorandum might plausibly be understood to state that she found the story impossible to believe because the story states or suggests that Tavoulareas' primary motivation in establishing the entire Mobil-Samarco-Atlas arrangement was to benefit his son. But we have held as a matter of law that the article cannot bear this interpretation. As we have previously recounted, the article neither stated nor implied that Tavoulareas engineered Mobil's participation in the Samarco venture for the sake of his son's business career.

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[43] We recognize that each individual piece of evidence cannot fairly be judged individually against the standard of clear and convincing evidence. Plaintiffs are entitled to an aggregate consideration of all their evidence to determine if their burden has been met. Even upon consideration and aggregation of all of Tavoulareas' asserted evidence of actual malice, *see supra* pp. 54-60, *infra* pp. 64-70, however, we conclude that he has failed to surmount the "clear and convincing" evidentiary obstacle.

Far from it, the article made it clear that Mobil officials decided to join Samarco in anticipation of Saudi preference shipping requirements and favorable Saudi financing. *See supra* p. 34. Thus, this possible understanding of Peterson's "impossible to believe" language, while demonstrating malice, has no connection to a defamatory meaning that the article will bear as a matter of law.

Second, the memorandum could be interpreted more narrowly to express disbelief that Tavoulareas "set up" Peter in Atlas. Yet, in light of the overwhelming evidence supporting that very charge in the hands of those at the *Post* responsible for the article's publication (and undisputed at trial), any such view held by Peterson was obviously wrong. Indeed, we have held that no reasonable jury, on this record, could have found the "set up" charge to be false. *See supra* p. 46. In this sense, the Peterson memorandum has no connection to any *false* statement.[44] We are persuaded, as was the District Court, that "no matter how this memorandum is construed," it provides no evidence that the *Post* acted with actual malice with respect to the publication of any *false defamatory* statement. *Cf.* 567 F. Supp. at 655.

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[44] The dissent suggests that the Peterson memorandum could logically encompass the "personally urged" allegation. Dissent at 46-47. This, in our view, is an unreasonably strained interpretation of the memorandum. The "impossible to believe" passage expressly relates to the "scheme" being set up by Tavoulareas, which we believe could only mean the entire Samarco-Atlas arrangement or, more naturally, the setting up of Peter in the arrangement. Nothing in the broad, impressionistic memorandum authored by an editor unsteeped in the facts of this complex corporate arrangement suggests any doubt about the accuracy of a specific event chronicled in the article. And we again note that the "personally urged" statement in the piece itelf was coupled with a statement of Mobil's written denial of that charge, an even-handed approach that scarcely bespeaks the presence of actual malice.

(ii) *Defendants' Ill Will or Bad Motives.* It is settled that ill will toward the plaintiff or bad motives are not elements of actual malice and that such evidence is insufficient by itself to support a finding of actual malice. *See, e.g., Old Dominion Branch No. 496 v. Austin,* 418 U.S. 264, 281-82 (1974). The rationale for this rule is that speech "honestly believed," whatever the speaker's motivation, "contribute[s] to the free interchange of ideas and the ascertainment of truth." *Garrison v. Louisiana,* 379 U.S. 64, 73 (1964). To recover, plaintiffs cannot ground their claim "on a showing of intent to inflict harm," but must, instead, show an "intent to inflict harm through falsehood." *Henry v. Collins,* 380 U.S. 356, 357 (1965). Nevertheless, reason and the weight of precedent suggest that, *under some circumstances,* the probative value of ill-will evidence in establishing "intent to inflict harm through falsehood" outweighs the risk that admitting such evidence will chill honestly believed speech.[45] *See, e.g., Cochran v. Indianapolis Newspapers, Inc.,* 175 Ind. App. 548, 560, 372 N.E.2d 1211, 1221 (1978) (holding that evidence of ill will creates jury question on actual malice where "[t]here are no facts or statements of record which even remotely support" the defamatory implication at issue); *Restatement (Second) Of Torts* § 580A comment d, at 218; *cf. Herbert v. Lando,* 441 U.S. at 160-63 & n.6. *See generally* Bloom, *Proof of Fault in Media Defamation Litigation,* 38 *Vand. L. Rev.* 247, 260-64 (1985). The appropriateness of such evidence must be determined on a case-by-

[45] The danger of admitting ill-will or bad-motive evidence is that the jury will mistakenly hold the defendant liable for his attitude toward the plaintiff rather than his attitude toward the veracity of his statements concerning the plaintiff. If the trial judge nonetheless determines in his or her sound discretion that such evidence should be admitted under Federal Rule of Evidence 403, the judge must seek to minimize the danger of unfair prejudice. *Cf. Westmoreland v. CBS, Inc.,* 596 F. Supp. 1170, 1172 n.1, 1178 (S.D.N.Y. 1984).

case-basis, bearing in mind that evidence of ill will or bad motives will support a finding of actual malice only when combined with other, more substantial evidence of a defendant's bad faith.

The ill-will or bad-motive evidence in this record, however, is lacking in probative value. The contention is that "Tyler's motive to hurt plaintiff flowed from his embarrassment when Mobil exposed his false description of an interview he had had with a Mobil executive earlier in 1979." Supplemental Brief for Appellant at 25. Four statements by Tyler are relied upon to establish his asserted plan to "get" Tavoulareas. We find none to be indicative of a willingness to publish falsehoods.

Toward the beginning of his investigation, Tyler remarked to Golden that "[i]t is not every day you knock off one of the seven sisters,"[46] Tr. at 172; he later referred to his article in part as a "case against Tavoulareas," RE at 2489; and after the article appeared, he characterized a session between Tavoulareas and *Post* editors as one in which the *Post* "blew [Tavoulareas] out of the water," and sent him home with his "tail between his legs." Tr. at 253-54. These statements, not unknown to the vernacular of litigators, seem to us well within the everyday parlance of an *investigative* reporter. They may reasonably be interpreted as revealing that Tyler had adopted an adversarial stance toward Tavoulareas. But, as in other professions, an adversarial stance is fully consistent with professional, investigative reporting. It would be sadly ironic for judges in our adversarial system to conclude, as the dissent urges us to do, *see* Dissent at 52-53, that the mere taking of an adversarial stance is antithetical to the truthful presentation of facts. We decline to take such a remarkable step in First Amendment jurisprudence. An adversarial stance is certainly not indicative of actual malice under the cir-

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[46] "Seven Sisters" is a colloquial term to describe the seven largest oil companies.

cumstances where, as here, the reporter conducted a detailed investigation and wrote a story that is substantially true. *See Westmoreland v. CBS, Inc.*, 596 F. Supp. 1170, 1174 (S.D.N.Y. 1984).

The fourth statement—that Tyler asked Piro whether "he knew of a family member who would rifle [Tavoulareas'] safe and [x]erox documents," Tr. at 180—is obviously beyond the pale, exceeding the bounds of acceptable professional conduct. As Tyler conceded at trial, the statement, even if intended as a joke, was utterly inappropriate. As noted in Judge Wright's dissent to the original panel opinion, however, we do not sit "as some kind of journalism review seminar offering our observations on contemporary journalism and journalists." 759 F.2d at 145.[47] Neither do juries. Tyler's avowed interest in obtaining documentary evidence from Tavoulareas' safe, no matter how contemptible the means to be employed, does not indicate a willingness to publish *unsupported allegations.*

In a similar vein, plaintiff argues that the jury's finding of actual malice is supported by evidence that "pressure [was] placed upon *Post* reporter Tyler to create sensationalistic stories." Supplemental Brief for Appellant at 20. Tavoulareas contends that evidence of such pressure is to be found in the testimony of Woodward, who was found not liable by the jury.[48] As the panel

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[47] *Cf. In re Network Coverage of the Democratic National Convention*, 16 F.C.C.2d 650, 658 (1969) ("[W]e [the FCC] are not passing judgment on the quality of the networks' coverage. It is the role of the public, critics, and students of the mass media, either to comment or be critical with regard to such matters.").

[48] Woodward testified that he used the term "holy shit story" to describe a kind of story he was looking for from his reporters. According to Woodward, the term "came from coverage of the Watergate story" and his own reaction to hearing the courtroom admission of one of the defendants

majority noted, the jury may reasonably have inferred that "Woodward, as editor, wanted from his reporters the same kind of stories on which he built his own reputation: high-impact investigative stories of wrongdoing." 759 F.2d at 121 (footnote omitted).

In our view, however, managerial pressure to produce such stories cannot, as a matter of law, constitute evidence of actual malice.[49] We agree with the *Post* that the First Amendment forbids penalizing the press for encouraging its reporters to expose wrongdoing by public corporations and public figures.[50] Rather, such mana-

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charged with the Watergate break-in that he had previously worked for the CIA. Tr. at 3952.

[49] In reaching this holding we remain well within the parameters of review that we marked out at the beginning of this analysis. *See supra* pp. 22-27. Under traditional j.n.o.v. standards, we are required to credit all "permissible inferences" that may have been drawn in plaintiff's favor. *See, e.g., Alioto v. Cowles Communications, Inc.*, 519 F.2d 777, 780 (9th Cir.), *cert. denied*, 423 U.S. 930 (1975), *quoted in* Supplemental Brief for Appellant at 8. In our view, an inference of "reckless disregard" drawn from evidence of managerial pressure to produce high-impact stories is not permissible. As we state in the text, we believe such an inference is permissible only where there is evidence of distorting pressure—that is, some showing of pressure for high-impact stories *without regard for accuracy.*

[50] The dissent suggests that our position is at odds with the *Post*, contending that the *Post* conceded the point that pressure to produce high-impact stories is some evidence of the reckless publication of the defamatory falsehoods against Tavoulareas. Dissent at 54. Our reading of the *Post*'s position, however, suggests substantial alignment with our express holding. First, the *Post* argues that "evidence that a newspaper engages in investigative reporting, even 'high-impact' or 'hard-hitting' investigative reporting, is an entirely inappropriate consideration in imposing liability for defamation." Supplemental Brief for Appellees at 28 (footnote omitted). Next, the *Post* states that " 'excessive pressure' brought to bear upon a reporter to come up with a 'sensa-

gerial pressure is designed to produce stories that serve, as the panel majority rightly stated, "one of the highest functions of the press in our society." *Id.* at 121 n.39.

We, of course, accept the tautological proposition that evidence of managerial pressure to produce sensationalistic or high-impact stories *with little or no regard for their accuracy* would be probative of actual malice. But Woodward's comments cannot reasonably be categorized as exhibiting such a distortive pressure, particularly in the context of a challenge, as here, to a thoroughly researched and largely accurate story. As far as this record shows, Woodward said nothing whatever to suggest or intimate that he was unconcerned with the truth of stories. *Cf.* Tr. at 3903. Even the dissent concedes that his comments do not indicate that the "*Post* subjectively desired false stories." Dissent at 54. Moreover, the record *in this case* in no wise suggests that Tyler and his colleagues understood the *Post*'s policy of encouraging aggressive investigative reporting to mean that their journalistic careers could be advanced by *reckless* charges of wrongdoing laid at the feet of the rich and powerful. *Cf. Butts*, 388 U.S. at 158 (Opinion of Harlan, J.) (finding actionable "grossly inadequate" investigation of published charges); *id.* at 169 (Warren, C.J., concurring) (finding actionable charges of corruption based on "slipshod and sketchy investigatory techniques"). Unlike the dissent, we reject the proposition that a jury question of actual mailce is created whenever a libel plaintiff introduces evidence that the newspaper vigorously pursues high-impact stories of alleged wrongdoing.

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tionalistic' story" may be a relevant consideration in determining "whether that reporter published a 'calculated falsehood.'" *Id.* Pressure that is "excessive," as we read the *Post*'s suggested standard, is not merely "heavy" or "intense" pressure to produce high-impact stories, but rather pressure to produce such stories *without regard for their truth.*

The remainder of the proffered evidence of actual malice merits little discussion in light of the overwhelming record evidence that the *Post* defendants published the article in good faith. The contention that the *Post* engaged in this instance in a pattern of "slanted reporting" indicative of actual malice is utterly without merit. As Judge Gasch observed, Tyler included most of the information furnished by Mobil in the article (with no substantial omissions) and suppressed no information that would have proved the article incorrect. *See* 567 F. Supp. at 654, 657-59.[51] Contrary to Tavoulareas' assertions, "[t]he seriousness of a [defamatory] charge, in itself, is not probative of recklessness," since "there is no basis . . . for the proposition that 'more serious' charges are less likely to be true than 'less serious' charges." *Washington Post Co. v. Keogh*, 365 F.2d at 970. Similarly, the absence of deadline pressure is pro-

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[51] For example, Tavoulareas asserted that the *Post* acted with constitutional malice in excluding from the article the favorable comments of Lewis Lapham, an outside director of Mobil, that "the Mobil board of directors consistently reviewed the relationship between Mobil and Atlas and the board was completely satisfied with all aspects of it" and that "he did not believe that plaintiff played a personal role in Atlas." 567 F. Supp. at 658; *see* Supplemental Brief for Appellant at 25; Brief for Appellant at 15, 42. As Judge Gasch observed, however, the article "did include at least three paragraphs that conveyed almost everything that Lapham had said." 567 F. Supp. at 658. More fundamentally, the *Post* had good reason to discredit Lapham's comments in light of the overwhelming evidence of Tavoulareas' actual role, known to the newspaper before publication but presumably unknown to Lapham. In light of Tavoulareas' admitted involvement in Atlas matters, it is remarkable that he would now invoke the statements of an outside director who, like Borch and Williams, was likely led to believe, erroneously, that Tavoulareas had *entirely* divorced himself from those matters. Tr. at 3550, 3588-89.

bative of nothing.[52] Finally, although the dissent suggests that Tyler may have been negligent in recording certain interview notes or in failing to investigate further, *see* Dissent at 56-57, 63, we are satisfied that his investigation taken as a whole, the nature and scope of which is undisputed, was sufficiently thorough and professional when held up to the daunting standards of actual malice. Moreover, even were we persuaded to accept the dissent's rigorous second-guessing of reporting techniques, the Supreme Court has flatly held that insufficient investigation alone may not support a libel verdict in the absence of evidence that the defendant subjectively held "serious doubts" about the truth of its statements. *St. Amant*, 390 U.S. at 731. This circuit, too, has recognized that "a rule requiring verification [of facts before publishing] in the absence of evidence that the publisher had good reason to suspect falsity would curtail substantially a protected form of speech." *Washington Post Co. v. Keogh*, 365 F.2d at 972-73. In light of these clear holdings, we cannot agree that an allegation of insufficient investigation may itself constitute the very proof of the "serious doubts" that is separately required.

IV. Piro

On appeal, Tavoulareas asserts that Philip Piro[53] published the following statements with actual malice: (1) that Tavoulareas set Peter up in Atlas; (2) that Tavoulareas personally dispatched Harmon Hoffman to run

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[52] Absence of deadline pressure has been found relevant in actual malice inquiries only to negate defendants' excuses for inadequate investigation of their stories. *See, e.g., Goldwater v. Ginzburg*, 414 F.2d at 339. No such situation is presented here.

[53] Tavoulareas does not contest and we assume, without deciding, that Piro, a nonmedia defendant, is protected by the *Sullivan* standard of actual malice when sued by a public figure.

Atlas after Comnas was fired; and (3) that Tavoulareas arranged for Peter's first job with the Lemos firm.

We have already discussed our finding that the "set up" statement is substantially true. We have also concluded that the allegation that Tavoulareas dispatched Hoffmann to Atlas is at worst an exaggeration of Tavoulareas' undisputed role, and adds no further defamatory implication to the substantially true charge that Tavoulareas set Peter up in business. Moreover, there is no evidence that Piro entertained serious doubt as to the truth of the dispatch statement.[54]

As for Peter's initial job with Lemos, Piro told Tyler and Golden that he "had no direct knowledge" but "knew that Lemos was a friend of the family and [was] sure that that assisted in obtaining a job for Peter." Tr. at 331; *see also* Tr. at 347. The District Court held that this statement was not defamatory. RE at 766 n.1. Tavoulareas challenges that holding on appeal, arguing that Piro made the remark to the reporters in order to buttress his primary and clearly defamatory accusation that Tavoulareas set up Peter in Atlas. Brief for Appellant at 30. The "set up" allegation, however, was not false, and we thus conclude that Piro's allegation about Peter's employment with Lemos had no false, defamatory implication.[55]

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[54] Piro told Tyler and Golden that he overheard Tavoulareas telling Everett Checket and he (Tavoulareas) had dispatched Hoffmann to Atlas. Tr. at 3720-21. Checket testified that he did not "recall" such a conversation. Tr. at 2847. (He did not flatly deny that the conversation had occurred, although his answer to the four preceding questions on other subjects had been an unequivocal, "Never." Tr. at 2846-47.). Even if Piro's testimony is disbelieved, there is no evidence that Piro knew that his statement was false or recklessly disregarded the probability that it was false.

[55] Moreover, even if the Lemos job allegation were defamatory, the record falls far short of providing clear and con-

V. Conclusion

This case has consumed the attention and energy of a courthouse beseiged by impatient litigants. We have nonetheless examined this record with the care and detail that the Constitution commands. After completing our task, we are firmly persuaded that the decision of the able and distinguished trial judge was correct. This verdict cannot stand.

Affirmed.

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vincing evidence that the statement was made with actual malice. Indeed, Tavoulareas' own testimony before the SEC was that he had played no role in getting Peter the job but that "Lemos . . . was a personal friend" and "must have known [Peter] was my son." RE at 2414.

APPENDIX

Washington Post, November 30, 1979, Page A-1

MOBIL CHIEF SETS UP SON IN VENTURE

Management Firm Is Used to Operate Oil Company Ships

By Patrick Tyler
Washington Post Staff Writer

Mobil Oil Corp. president Wililam P. Tavoulareas set up his son five years ago as a partner in a London-based shipping management firm that has since done millions of dollars in business operating Mobil-owned ships under exclusive, no-bid contracts.

Tavoulareas' son, Peter, was a 24-year-old shipping clerk in 1974, making $14,000 a year. Today, with the help of Mobil, he owns 45 percent of Atlas Maritime Co., which operates 17 ships worldwide.

Mobil, the second largest oil company, provided Atlas with some of these ships—among them Mobil-owned supertankers—under management agreements that allowed Atlas to go into business with a minimal amount of capital.

Mobil also initially provided Atlas with office space in Mobil's corporate offices in London and loaned Atlas a Mobil shipping vice president when Atlas' own top shipping executive resigned in 1975.

[5] Mobil leased back the ships it provided Atlas, thus creating work for Atlas at a time when the shipping industry was severely depressed.

The leasing was handled through an intermediary company, Samarco, of which Mobil owns 45 percent.

According to one source, Peter Tavoulareas put up no investment capital for his initial 25 percent share of

Atlas. Moreover, the lucrative Mobil contracts, along with other managerial assistance, provided by Mobil, helped make Atlas an overnight success. Peter Tavoulareas, now 30, maintains a highly affluent life style, including a home in one of London's most fashionable districts, a Rolls Royce and a summer home on Long Island.

The creation of Atlas was a marked departure from Mobil's historical practice of managing its own fleet of crude oil tankers through its shipping and transportation division.

Atlas was created to handle the day-to-day management work for Samarco, a compelx shipping partnership that Mobil negotiated in 1974. The other partners included a prominent Saudi Arabian merchant family and a member of the Saudi royal family.

[10] Samarco—Saudi Maritime Co.—was set up as a way to share shipping revenues among the partners, but the company existed largely on paper, according to one of its original directors, John D. Kousi.

The complicated transactions between Mobil and Atlas and Samarco are not especially unusual in the intricate world of international oil—except perhaps for the presence of father and son. That relationship is not illegal, but securities law requires that Mobil officials report it fully to their stockholders. Mobil claims it did, but that is in dispute.

Beyond the legal questions, however, the story of Mobil's president and his son offers a rare glimpse into corporate behavior at the top of one of the largest publicly held international oil companies.

The Mobil board of directors was told from the outset about the Atlas arrangement but was assured that company president Tavoulareas was not involved in his son's venture in any way.

Mobil officials did not tell their stockholders about the son's involvement in Atlas until two years later.

[15] After initial press inquiries in the fall of 1976, Mobil board chairman Rawleigh Warner, Jr., disclosed in a special letter to stockholders that Peter Tavoulareas "is one of the principals" of Atlas.

That disclosure prompted an investigation by the Securities and Exchange Commission (SEC) in early 1977, but the inquiry was dropped after confidential sworn testimony was taken from the elder Tavoulareas.

U.S. securities law requires that corporate officials disclose the details of business transactions between companies and relatives of the companies' executives. The law was designed to protect shareholders from business decisions based on favoritism.

In recent days, the SEC has reopened its investigation into the role Mobil's president played in his son's partnership in Atlas.

Mobil chairman Warner says he assured directors in board meetings that Tavoulareas "does not participate in any decisions" relating to Mobil's business with Atlas.

[20] But a source close to the Tavoulareas family and those familiar with the formation of Atlas said Mobil's president was involved personally in several key decisions and actions relating to Atlas, among them:

- Tavoulareas personally recruited two shipping executives, one an outside consultant and the other a Mobil vice president, for Atlas. One of them set up and ran Atlas for more than a year. The other managed it for a time.

- The Mobil president helped negotiate the arrangement whereby the Saudi shipping partnership, Samarco, would turn over all of its management business to Atlas. Mobil officials acknowledged this in a statement last week to The Post.

• As the formation of Atlas was being planned in April 1974, Tavoulareas personally urged that his son be included as an equity partner in Atlas. However, in the Mobil statement, Tavoulareas denies this. "Mr. Tavoulareas asserts that he did not initiate this arrangement," the statement said.

• The elder Tavoulareas played a personal role in forcing the resignation in 1975 of Greek shipping executive George D. Comnas, who had been recruited a year earlier by Tavoulareas to set up Atlas. The resignation followed several personal disputes between Comnas and Tavoulareas' son. Mobil's statement said "Mr. Tavoulareas played a minor role . . . in the arrangements made when Comnas departed from Atlas. Since it was on Mobil's recommendation—including Mr. Tavoulareas' . . . [that Comnas set up Atlas], it was logical that Mr. Tavoulareas participate."

[25] The elder Tavoulareas was not available for an interview, but through a spokesman acknowledged that the basic idea to set up Atlas was his and that he recommended Comnas set it up. But he denied that he urged that his son be accepted as a partner and stated that he divorced himself from Mobil's business with Atlas after his son joined the company.

Comnas, according to Marquis Who's Who, completed a 30-year career with Exxon in 1968 and was president of Mediterranean and African subsidiaries for Exxon during his last years there. In the five years before he formed Atlas, Comnas, 66, was managing director and chairman of the board of C.M. Lemos & Co. Ltd. of London, reportedly the largest of the Greek shipping firms.

One of Mobil's partners in Samarco said that the involvement of Peter Tavoulareas was accepted without objection because it was assumed that other Atlas managers were competent to run the business.

"Clearly it was a nepotistic act," said Kousi, one of the original directors of Samarco. "At his age [Peter was 24 in 1974] he wasn't a genius, nor was he terribly experienced in shipping. You couldn't expect a lot from someone with that level of experience."

Philip Piro, a Baltimore eye surgeon and former son-in-law to the elder Tavoulareas, who is now estranged from the family, said Tavoulareas expressed his interest at the time as "giving Peter a little nudge to get him along." Tavoulareas, through a spokesman, said he does not recall making the remark.

[30] In 1973, a year before young Tavoulareas became a partner in Atlas, he was making $14,000 a year as a clerk in the London office of Greek shipping magnate Lemos. Sources said that job also was arranged by his father.

Before that, the Mobil president's son was graduated from St. Johns University in New York, where his father sits on the board of trustees, and later received a master's in business administration from Columbia University.

In an early interview, Peter Tavoulareas said that his partnership in Atlas did not represent "overt favoritism" and that his responsibilities in the company revolved around "financing." Peter Tavoulareas said that he was asked by Comnas to join Atlas and was offered an equity interest.

In a later interview, Peter Tavoulareas would not comment further. "I've answered all of the questions you're going to get from me. Atlas has nothing to do with Mobil [in some early editions "Saudis"], it has nothing to do with Samarco and it has nothing to do with the Saudis. Atlas is none of your damn business." He then hung up.

In recent weeks, Mobil has not responded to Washington Post requests for interviews with company officials

familiar with Atlas and its operations. The first such request was made Nov. 8. Mobil's vice president for public affairs, Herbert Schmertz, said Nov. 16. "We're not saying no and we're not saying yes." Still later, Schmertz said the request was "under consideration." In a letter to The Post Nov. 12, another Mobil spokesman, John Flint, said, "We understand that you have been advised that this matter has been examined by several reporters for The Washington Post and New York Times, and apparently they found no basis to do a story."

[35] The Post did make a brief inquiry into Atlas in 1976, but received assurances from Mobil executives that Mobil's president had maintained a completely "hands off" attitude toward Atlas. The Post began a new inquiry two months ago, based on new information about Atlas.

Mobil's Schmertz eventually requested that questions be dictated so that Mobil could respond in writing. This was done and Mobil responded to these questions Nov. 20.

Several sources who agreed to discuss the details of this episode if their identities were protected were intimately familiar either with Mobil's shipping operations or with the attempts by Mobil's president to secure a position for his son in the upper strata of the business world.

The story of international finance, shipping and oil politics begins with the 1973 Arab oil embargo.

In the wake of the oil cutoff, Mobil officials learned that a prominent Saudi merchant company, Haji Abdullah Alireza & Co., was interested in extending Saudi influence from the production of oil to its transportation.

[40] Mobil officials believed at the time that a shipping partnership with the Saudis might yield preferential treatment in the loading of crude oil at Saudi ports.

In his 1976 message to stockholders, Mobil's Warner said, "Samarco was formed in anticipation . . . of

[Saudi] flag preference regulations applicable to exports of petroleum from that country and, also, in anticipation of . . . favorable financing from Saudi Arabian sources."

Mobil and its partners in the venture acknowledge now that neither the preference laws nor the financing for ships materialized.

"The business reasons were wrong, they didn't prove out," says Kousi, whose company sold out its interest in Samarco to Mobil two years ago. "We just didn't see the anticipated benefits," he said.

But at the time Samarco was formed, Mobil officials felt "preference shipping was much more a threat," according to the Mobil statement. Samarco, however, in which Mobil initially held a 30 percent interest and now holds a 45 percent interest, existed mostly on paper. The real work of the partnership would be performed by the management company, Atlas.

[45] "There was no staff or offices for Samarco," said Kousi. "It needed no real offices."

The negotiations between Mobil executives and the Saudi partners in Samarco took all of 1974. After the partnership agreement was struck in December, Mobil issued a brief press release saying, "Samarco has engaged the services of Atlas Maritime . . . to manage the operation of Samarco's fleet."

In its statement last week, Mobil acknowledged that "Atlas was created in anticipation of managing Samarco's business." Atlas was created in July 1974.

Mobil president Tavoulareas, the statement continues was involved in the "policy aspects of participating in Samarco and the concept of Atlas" during those negotiations.

Mobil's first goal when it entered the talks in January 1974 was to steer the Saudis away from a partnership

they had formed with a New York-based shipping concern, Fairfield-Maxwell Ltd. The Saudis had approached Fairfield-Maxwell after Mobil initially rejected the joint venture idea.

[50] "The initial invitation from the Saudis was turned down . . . consistent with our normal policy of providing our own transportation and not permitting preference shipping," Mobil said last week.

But Mobil officials said they subsequently perceived a greater threat from preference shipping. Sources said Mobil then dispatched two negotiators to Jeddah in Saudi Arabia to push Mobil as a partner. One of the negotiators was Mobil's Mideast agent, W. Jack Butler, and the other was the Greek shipping executive, Comnas, who was recruited personally by Tavoulareas to advise Mobil on how to set up an independent shipping concern.

By April, the talks on Samarco had progressed far enough that the management arm of the partnership was being planned by Tavoulareas, who recommended to the partners that Comnas be tapped for the job. Late in April, according to one knowledgable source, Tavoulareas personally urged that his son become a partner in Atlas. Sources said that shortly thereafter, the issue of young Peter's involvement was raised with Mobil chairman Warner, who said he raised the issue with the directors and won their approval.

In its statement, Mobil said, "It was George Comnas who asserted that he would like Peter Tavoulareas and one other associate at Lemos, a major shipping company, to join him in the management of Atlas. Mr. Tavoulareas asserts that he did not initiate this arrangement."

Nevertheless, the other Lemos employe who came to Atlas with young Tavoulareas, an experienced insurance clerk named Ares D. Emmanuel, was given only employe status while Peter Tavoulareas was made a 25 percent

partner. Within a year, Tavoulareas would become a 45 percent partner.

[55] After Atlas became fully operable in late 1974, the time came for Samarco to begin acquiring ships for Atlas to manage. However, contrary to Mobil's hopes when it formed the partnership, the Saudis were unwilling to provide any investment funds or financing for ships.

Mobil said in its statement that an unspecified amount of "capital contribution" was made by each partner when Samarco was formed. One of the partners, the son of Crown Prince Fahd, heir to the Saudi throne, apparently had a special arrangement. Said Mobil: "The prince's share was financed by loan, which he must repay before he receives any financial benefits in the company."

As a result, in early 1975, Mobil provided Samarco's first vessel from its own fleet. The ship, a supertanker, had been launched as the Mobil Mariner, but was renamed the Saudi Glory, presumably to reflect the interests of the Saudi partnership.

The Saudi Glory was turned over to Atlas by Mobil under a "bareboat" lease through Samarco, meaning the structure of the tanker, without crew, fuel or stores, was rented to the Saudi partnership and its management arm. However, because Samarco and Atlas had no funds with which to pay such a rental fee, the ship was leased back to Mobil simultaneously.

Under this arrangement, Atlas agreed to operate the vessel for Mobil, hire crews, arrange for fueling and handle small maintenance chores. All major repairs were Mobil's responsibility. Thus Mobil paid Atlas the cost of operating the ship plus an unspecified margin of profit.

[60] Mobil's executive vice president for Mideast transportation, Paul J. Wolfe, said in an early interview that Atlas' basic management fee was $600,000 a year and

included an escalation clause. Other sources said the fee would escalate with the cost-of-living index and also after Atlas acquired more than 10 ships.

Peter Tavoulareas said the management fee was $680,000 for 1976, when Atlas was operating six ships.

The firm's income for subsequent years is not known, but one knowledgeable source said that Atlas was structured so that profits would increase dramatically as more ships were acquired, because overhead costs for staff and office space were relatively fixed.

Because Mobil operates its own ship management arm within the Mobil organization, it could have managed the Samarco fleet itself, company officials acknowledged.

But Mobil officials claim that there could have been a conflict of interest for any one of the Samarco partners to manage the ships owned by all of the partners. Mobil's statement said:

[65] "Mobil did not want to manage Samarco or to set up a Samarco management company, as there could be a conflict of interest between Mobil and Samarco when chartering ships in or out for either company. Neither of the Saudi partners had experience to qualify them to manage. Fairfield-Maxwell could have had a similar conflict. Accordingly, it was prudent to have an independent third-party managing company."

Mobil officials said a study was done of management fees in the shipping industry as a guide to setting Atlas' fees. But the company acknowledged that there were no bids.

"Ship management arrangements are difficult to assess on a bid basis . . . From Mobil's experience, the overriding selection criteria for such operations is the prospect of good, safe performance and access to low-cost dependable crews," the company's statement said.

(Atlas has lost one ship, the Atlas Titan, which exploded and burned last May at Setubal, Portugal, during a tank-cleaning operation, according to Lloyd's of London. The ship was sold for scrap in July.)

According to Mobil's statement, one advantage derived from using Atlas as a management company came from Atlas' "ability to use low-cost Greek crews unavailable to Mobil or to other, similar non-Greek companies."

[70] Kousi, Mobil's partner at the time, reacted to that statement by saying, "Who didn't [have access to low-cost Greek crews]? That's a phony argument." Kousi said that virtually all companies who have international subsidiaries, such as Mobil, have access to low-cost crews of Greek and other nationalities.

It is not clear from maritime records how many ships Mobil supplied to Atlas under the contract arrangement. The records show that in March 1978, Mobil was the registered owner of an oil tanker named the Yanbu that was under Atlas' control. And, last October, Mobil supplied to Atlas another tanker named the Solon, records show.

The second of the ships that were turned over to Atlas in 1975 was also a Mobil ship. The 250,000-ton supertanker, launched as the Mobil Supplier, according to Federal Maritime Commission records, was renamed the Al Haramain.

The third ship, also Mobil's was launched as the Elena and became the Al Rowdah.

Presently, Mobil officials said in their statement that they have chartered "certain tankers" to Samarco "and chartered most of these back from Samarco on a time charter basis."

[75] Of the 17 ships Atlas reportedly operates worldwide, Mobil said seven are run for Samarco and four of those ships are owned by Mobil.

Less than a year after this corporation was set up to manage the fleet assembled by Mobil with the Saudis, Atlas underwent an internal struggle in which Peter Tavoulareas and one of his employees, Emmanuel, took over control of the company.

Comnas, who had been recruited by Mobil to set up Atlas and run it, resigned in mid-1975. Mobil's Wolfe explained the Greek shipping executive's departure by saying that Samarco's directors had grown dissatisfied with his performance.

Kousi, who was on the Samarco board at the time, declined to discuss Comnas' departure in detail. He did say that it was not Samarco's board that was dissatisfied, but rather, "Mobil basically was dissatisfied."

Sources familiar with the situation said that Peter Tavoulareas had several personal disputes with Comnas and shortly thereafter, his father, William Tavoulareas, intervened. Mobil acknowledged that Tavoulareas played a minor role by "assuring a settlement that was fair and equitable to both parties."

[80] That settlement reportedly included Mobil paying Comnas a substantial retainer as an independent marine consultant for several years.

The relationship between the Mobil president and Atlas also was exemplified by his response when Atlas was left without a seasoned shipping executive in control after Comnas departed.

Almost immediately, according to Piro and other sources, the elder Tavoulareas dispatched one of his senior shipping executives, Herman F. Hoffmann, to London to help run Atlas.

Said Kousi: "Mobil had suggested Comnas so it was natural for Mobil to step forward and to feel an obligation to meet whatever vacuum they thought existed."

Mobil gave this account in its statement: "Since Mobil had originally recommended G. Comnas to Samarco, we felt an obligation to Samarco to maintain quality management of their operations. We made Hoffmann . . . available as an interim manager of Atlas."

[85] During this period, Hoffmann was given the opportunity to take over Atlas permanently, but he declined. While he remained at Atlas, Mobil officials said, Hoffmann's salary "was pro-rated in proportion to his time. Atlas reimbursed Mobil for that portion relating to Atlas duties, plus all related expenses."

Special correspondent Sandy Golden contributed to this report.

Chief Judge Wald's Concurrence in Judgment

WALD, *Chief Judge*, concurring in the judgment: I concur in the judgment of the majority that the jury verdict for the plaintiffs should be overturned. I write separately, however, because I believe that such a result can be justified only if this court reviews the verdict under the special independent review standard set out in *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984).

Both the majority and dissenting opinions leave the distinct impression that neither opinion adheres to the standard of review it claims to be employing. The majority purports to apply the traditional standard for overturning a jury verdict, *i.e.*, the reviewing court must accept all "permissible" inferences the jury might draw from the objective facts it finds. *See* maj. op. at 25-27. Nonetheless, throughout its opinion it scrutinizes the inferences to be drawn from evidence of actual malice far more rigorously than that ordinary judgment n.o.v. standard would permit. The dissent, on the other hand, accepts the independent review principle of *Bose* as applicable, but then proceeds to interpret it as requiring that an appellate court give complete deference not only to the jury's presumed factual findings but also to any reasonable inferences from those findings that might support the verdict. The court's independent review is to be restricted to the "ultimate constitutional issue." *See* diss. op. at 16, 45.

Because I believe that this highly publicized and controversial case should be reviewed according to an articulated standard that comports with what the court actually does, I will set out the standard I think should apply here. I find this necessary not only because I do not think an ordinary judgment n.o.v. standard, or even the pre-*Bose* independent review standard the majority claims to apply [1], would permit us to overturn the verdict,

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[1] The majority states that it "conduct[s] the requisite *independent review* in this case, without relying on *Bose* . . . ." Maj. op. at 52 n.37 (emphasis in original). Under this pre-*Bose*

but also because the majority's refusal to admit it is applying *Bose*'s special independent review standard here will confuse the law for all judgments n.o.v., not just libel cases.

At a minimum, I believe *Bose* requires an appellate court independently to apply the legal standard of actual malice to the facts established by the evidence; this independent review is "a constitutional responsibility that cannot be delegated to the trier of fact." *Bose*, 446 U.S. at 501.[2] Contrary to the position taken by the dissent, this responsibility requires us to independently review

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form of independent review, the majority explains, reviewing courts in defamation cases have traditionally "carefully and independently reviewed findings of fact and rejected jury verdicts when all favorable inferences did not constitute clear and convincing evidence of actual malice." Maj. op. at 27.

[2] Although the issue in *Bose* was the standard of review to be applied to a trial court's determination that a statement was made with actual malice, the Court indicated that its holding applied to review of a jury verdict as well: "[T]he rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge." 466 U.S. at 501; *see also id.* at 508 n.27 (Court announced rule of independent review in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), in which it was reviewing a state court judgment entered on a jury verdict).

In his dissenting opinion in *Bose*, Justice Rehnquist argued that review of a jury verdict "presented the strongest case for independent fact-finding by this Court:"

> The fact-finding process engaged in by a jury rendering a general verdict is much less evident to the naked eye and thus more suspect than the fact-finding process engaged in by a trial judge who makes written findings as here. Justifying independent review of facts found by a jury is easier because of the absence of a distinct "yes" or "no" in a general jury verdict as to a particular factual inquiry. . . .

466 U.S. at 518 n.2 (Rehnquist, J., dissenting).

inferences that the jury may be presumed to have drawn, even though those inferences are "permissible" ones under the traditional judgment n.o.v. standard. We need not subject all of the jury's inferences to this closer scrutiny, however, but only those in which the jury apparently inferred, on the basis of its preliminary factual determinations, that the defendants acted with reckless disregard for the truth.[3] But we must reexamine these inferences to determine for ourselves whether the facts on which the jury relied constitute clear and convincing evidence of actual malice.[4]

Were we to follow the dissenting opinion's interpretation of *Bose*, I fear it would prove impossible in virtually all libel cases for a reviewing court to defer to all permissible inferences the jury may be presumed to have drawn, and then to conduct a truly independent review of the jury's ultimate determination that the defendant acted with actual malice. The human mind is just not that agile, and indeed that is why judgments n.o.v. are so unusual; something must be very wrong before a reviewing court can give the jury the benefit of every reasonable inference and still find evidence lacking for their verdict, even under the preponderance standard. For example, in this case, once the dissent accepts the

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[3] *See Bose*, 466 U.S. at 514 n.31 ("only those portions of the record which relate to the actual malice determination must be independently assessed").

[4] According to a leading commentator, the Supreme Court held in *Bose* that

> [a]n appellate court cannot content itself with accepting the results of "reasonable" application of admittedly correct legal norms to the historical facts. The court's responsibility is to scrutinize the record and marshal the evidence to see if it yields the characterization put on it by the court below.

Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 242 (1985) (footnote omitted).

jury's "reasonable" inferences that the Peterson memorandum "raise[d] in [the defendants'] minds subjective doubts as to the accuracy of the story," that "the defendants *knew* that Comnas was not trustworthy," that the *Post's* "extreme pressure for sensationalistic stories [led] to distortion of the truth," and so on through each of the allegations made by the plaintiffs, *see* diss. op. at 43-65, there is nothing left for an appellate court to review: the conclusion that the defendants acted with actual malice follows inevitably. Independent review of the jury's inferences concerning the existence of actual malice is necessary if we are to fulfill our responsibility to decide "independently . . . whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'" *Bose*, 466 U.S. at 511.[5]

The majority, on the other hand, while stating that it need not apply any special post-*Bose* "independent review" standard to arrive at the determination that the defendants did not act with actual malice, in fact does reexamine and reject "permissible" inferences which the jury might have drawn to support their verdict. For example, the majority acknowledges that the jury could find that copy editor Christine Peterson had conveyed to the defendants that she found "the story's theme impossible to believe," and it recognizes that "the Peterson memorandum is evidence of . . . actual malice." Maj. op at 62. Nevertheless, the majority concludes that this

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[5] This reading of *Bose* is consistent with the Supreme Court's discussion of the evidence of actual malice in that case. The Court accepted the district court's finding that a statement in the review challenged as libelous was an inaccurate description of what the engineer who prepared the report on which the review was based had actually perceived, but it rejected the district court's inference from this evidence that the engineer "must have realized the statement was inaccurate at the time he wrote it." 466 U.S. at 512.

evidence will not support an inference of actual malice with respect to the allegation that Tavoulareas "personally urged" Comnas to accept Peter as a partner, the one statement in the article which the majority holds to be both false and defamatory. *See id.* at 63 n.44. Similarly, the majority concedes that there was evidence casting doubt on the reliability of Comnas as a source for the article, including "evidence of personal animus between Comnas and Tavoulareas," but rejects the inference that reliance on Comnas could be viewed as indicative of actual malice. *See* maj. op. at 54-59. I could go on, but suffice it to say my own review of the record convinces me that the majority does in fact subject the evidence of actual malice to independent review of inferences to be drawn from it, as indeed it should under *Bose*, in order to assure that malice has been proven by "clear and convincing" evidence, and as I believe it must in order to arrive at its ultimate judgment, with which I agree. What I find disturbing, though, is its reluctance to acknowledge what it is doing or to grapple with the articulation of what is a proper application of *Bose* to the record. For future cases we badly need to clarify the appropriate role of a reviewing court in this volatile area of the law, and in this case, regrettably, we have lost a valuable opportunity to do so.

Judge Ginsburg's Concurring Opinion

GINSBURG, RUTH B., *Circuit Judge, concurring*: I concur in the court's opinion holding that the evidence in this case was insufficient to warrant submission to a jury's judgment. That decision, however, is more securely made at a distance from the trial itself. Immediately at the close of a hard-fought trial, the presiding judge, who must rule at once upon a motion for a directed verdict, is in a less advantageous position. He or she may prefer to abide the jury's report and, if necessary, thereafter consider, with some space for reflection, whether to grant a requested judgment n.o.v. Despite our decision today, therefore, hotly contested cases of this genre are likely to reach juries again. With that prospect in view, I write separately to suggest what a trial judge might do to enhance the jurors' capacity to comprehend and impartially apply the governing law.[1]

Keeping the jury on track poses a formidable challenge for the judge in a libel case governed by the "actual malice" standard of *New York Times v. Sullivan*, 376 U.S. 254 (1964). As Justices Black and Goldberg anticipated, the risk is considerable that jurors will not comprehend the difference between reckless disregard and mere neglect or carelessness, or will confuse or blend the separate issues of falsity and actual malice. *See id.* at 293 (Black, J., concurring) (malice "is an elusive, abstract concept, hard to prove and hard to disprove"); *id.* at 298 n.2 (Goldberg, J., concurring) ("The requirement of proving actual malice or reckless disregard may, in the mind of the jury, add little to the requirement of proving falsity, a requirement which the court recognizes not to be an adequate safeguard."). The challenge for the trial

[1] I rely throughout on a concise paper prepared for the Federal Judicial Center describing why and how separate, seriatim verdicts were obtained from the jury in Sharon v. Time, Inc., No. 83-4660 (S.D.N.Y.) (Jan. 16, 1985: defamatory nature of publication), (Jan. 18, 1985: falsity), (Jan. 24, 1985: actual malice). *See* Sofaer, Jury Management in Sharon v. Time, Inc. (Sept. 15, 1985).

judge demands attention throughout the proceedings. It is not met by allowing the jurors to listen, without education, as the evidence unfolds and then submitting the case for their general verdict after "dous[ing] [them] with a kettleful of law during the charge that would make a third-year law-student blanch." *See Skidmore v. Baltimore & O.R.R.*, 167 F.2d 54, 64 (2d Cir.) (Frank, J.) (quoting BOK, I, TOO, NICODEMUS (1946)), *cert. denied*, 335 U.S. 816 (1948). *See generally* Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CALIF. L. REV. 731 (1981).

Instead, the judge should act to reduce the risk that "the protective benefits of the *Sullivan* rule [will become] mythical." Lewis, New York Times v. Sullivan *Reconsidered: Time to Return to "The Central Meaning of the First Amendment,"* 83 COLUM. L. REV. 603, 617 (1983). The trial judge can explain, instruct, or clarify continuously, from the commencement of the trial through to the jury's deliberations. The means at hand include: instructing the jury, in plain English, at the opening of the case and at appropriate times during trial,[3] as well

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[3] Some "instruction" might come from counsel rather than from the judge. In Westmoreland v. CBS, No. 82-7913 (S.D. N.Y., settled and dismissed Feb. 18, 1985), Judge Pierre N. Leval allowed counsel an opportunity to address the jury from time to time during the 62-day course of the trial. These "int-sums" were limited to a total of 120 minutes for each side. The lawyers had each used about 100 minutes in int-sums, averaging about two and a half minutes each, by the time the case was settled. Counsel used the int-sums to "explain the significance, strength, or weakness of proof; to point out confirmation or contradiction of other evidence; to introduce new themes; to respond to opposing arguments; and to challenge the adversary's ability to prove his contentions." Leval, *From the Bench: Westmoreland v. CBS*, 12 LITIGATION 7, 66 (1985). Although Judge Leval acknowledged that both the integrity of counsel and the vigilant control of the judge were necessary to prevent abuse of this system, *see id.* at 66, he found it a very

as at the close of the case; allowing the jury to retain during deliberations a copy of the charge or key portions of it; and requesting the jury to return a special verdict or a general verdict accompanied by answers to interrogatories. *See* Fed. R. Civ. P. 49.

I.

Experience supports the intuition that jurors have considerable trouble "distinguishing actual malice from mere negligence." Note, *Punitive Damages and Libel Law*, 85 HARV. L. REV. 847, 860 (1985); *see* Lewis, *supra*, at 613-14. As Judge Bork has observed, "[t]he evidence is mounting that juries do not give adequate attention to limits imposed by the first amendment and are much more likely than judges to find for the plaintiff in a defamation case." *Ollman v. Evans*, 750 F.2d 970, 1006 (D.C. Cir. 1934) (concurring opinion); *see* Kaufman, *Libel 1980-85: Promises and Realities*, 90 Dickinson L. Rev. 542, 552 (1986) (citing studies by Libel Defense Resource Center documenting jury verdicts against media defendants at rates of between 60 and 90 percent); Franklin, *Suing Media for Libel: A Litigation Study*, 1981 AM. B. FOUND. RES. J. 797, 804, Table 7, nn.19, 20

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useful way to keep the jury on track during the course of the long and complex *Westmoreland* trial. *See id.*

An additional technique adopted by Judge Leval in that case may also be useful in reducing jury confusion. The judge put a limit on the total number of hours each side could use to present its case, including both direct examination or introduction of evidence and cross-examination. This approach left the lawyers with complete control over how the time was allocated. *See id.* at 7-8. The lawyers in the *Westmoreland* case believed that they had "tried their case better as a result of the time limit, and that [trial time] was shorter by a half than it would have been." *Id.* at 8. And the jury was spared the burden of attending to and remembering an even greater quantity of evidence put in over a longer period of time.

(contrasting decisions for libel plaintiffs in only two of five cases tried without a jury, with jury verdicts for plaintiffs in 20 of 24 cases).

In the libel area particularly, it is not a large exaggeration to suggest that jurors "can easily misunderstand more law in a minute than the judge can explain in an hour." Sunderland, *Verdicts, General and Special*, 29 YALE L. J. 253, 259 (1920); *see* Charrow & Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1316 (1979) (jurors were able to paraphrase correctly only 54% of their instructions); *see also* Severance & Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 L. & SOC. REV. 153, 179-80, Table 2 (1982) (overall rate of incorrect responses for jurors with standard instructions was 29.6%); Note, *Jury Instructions v. Jury Charges*, 82 W. VA. L. REV. 555, 558 (1980) (citing O'Mara & von Eckartsberg, *Proposed Standard Jury Instructions—Evaluation of Usage and Understanding*, 48 PA. B.A.Q. 542, 550 (1977)) (in 1976 Pennsylvania study, only 68% of jurors could demonstrate actual comprehension of some standard instructions).

II.

To arm the jury with the information needed for the intelligent performance of its task, the judge might first endeavor to speak the language of the jurors, and avoid the jargon of the legal profession. Terms familiar to a lay audience, and shorter, less complex, more active sentences, increase the chance that the jurors will understand and recall the judge's instructions. In addition, in lieu of a laundry list of law without discernible structure, a logically-ordered set of directions for consideration and decision of the separate issues should aid the jury to start out and remain on track. *See* Charrow & Charrow, *supra*, at 1326-27, 1338-39; Note, *Jury Instructions*, *supra*, at 558-59 & n.17.

Second, instructions should not be reserved exclusively for the trial's finale. Enlightenment from the judge at the outset fosters "intentional" learning; by informing the jurors initially of the inquiries they are ultimately to undertake, early instructions may stimulate or facilitate the mental process involved in connecting up issues and key items of evidence. *See* Note, *Jury Instructions*, *supra*, at 562 & n.37. Mid-stream instructions may be useful as well. They can serve as definers of difficult-to-grasp law at the moment that law bears on evidence produced. *See id.* at 565-67. The very repetition of instructions on elusive concepts should lessen the jury's sense of insecurity or discomfort in dealing with those concepts.

In addition, "[t]here is a clear suggestion in the available research that access to written instructions in the jury room improves the quality of deliberations. This may be due in part to the optimal effects of presenting material in both visual and auditory modes." Severance & Loftus, *supra*, at 155 n.4 (citing Forston, *Sense and Non-Sense: Jury Trial Communication*, 1975 B.Y.U.L. REV. 601 (1975)); *see* Cunningham, *Should Instructions Go Into the Jury Room?*, 33 CALIF. ST. B. J. 278 (1958); Katz, *Reinstructing the Jury by Tape Recording*, 41 J. AM. JUD. SOC'Y 148 (1958). Detailed instructions delivered from the bench on the actual malice issue, for example, might accompany the jurors in written form as they proceed to deliberations.

Finally, the special verdict or its cousin, the general verdict accompanied by answers to interrogatories, *see* Fed. R. Civ. P. 49, may be a particularly useful check against jury misconstruction or misapplication of a standard as uncommon as actual malice.[3] No recent in-

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[3] *See* Parker, *Free Expression and the Function of the Jury*, 65 B.U.L. REV. 483, 550-56 (1985) (maintaining that "[c]ases involving free expression are precisely the type of

vention, the special verdict originated in early days when jurors were subject to severe punishment if a court determined that they had returned an "unjust verdict." By electing to deliver a special verdict, thereby limiting their function to fact finding, jurors obtained a measure of protection against such an indictment. *See generally* Morgan, *A Brief History of Special Verdicts and Special Interrogatories*, 32 YALE L. J. 575 (1923).

The modern rule places the form of verdict in the hands of the judge and permits broad discretion in designing special verdicts, or general verdicts with interrogatories. In a case governed by the *Sullivan* standard, separate questions on the issues of defamatory meaning, falsity, and actual malice would impel the jurors to advert to the framework within which the judge has instructed them to consider the case and could assist them to hold the distinct legal questions in clear and separate view.[4] The inquiries thus may promote both comprehen-

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cases that demand the use of general verdicts with interrogatories of rule 49(b)").

Objections to special jury findings center on their use in run-of-the-mine cases in which strict application of the rules of law is widely viewed as inconsonant with popular conceptions of "substantial justice." *See, e.g.*, 9 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2503 (1971); James, *Sufficiency of the Evidence and Jury-Control Devices Available Before Verdict*, 47 VA. L. REV. 218, 246-48 (1961); *cf.* 374 U.S. 865, 867-68 (1963) (Justices Black and Douglas oppose Rule 49 because it allows judges "to weaken the constitutional power of juries"). *Compare* Morris v. Pennsylvania R.R., 187 F.2d 837, 840-41 (2d Cir. 1951) (declaring that courts should use special verdicts only with "discrimination and foresight") *with id.* at 843 (Frank, J., concurring) (advocating frequent use of special verdicts contrary to the wishes of "those who appear to esteem the [jury] system just because it gives rein to the passional element of our nature") (quoting Skidmore v. Baltimore & OR.R., 167 F.2d 54 (2d Cir. 1948) (Hand, J., concurring)).

[4] The trial judge in Sharon v. Time, Inc., Abraham D. Sofaer, reported the cooperation of counsel in allowing the

sion and actual application of the governing first amendment law.[5]

New York Times v. Sullivan presents a standard that may slip from the grasp of lay triers unfamiliar with legal concepts and perhaps unsympathetic to publishers who print statements shown to be false. Careful efforts by judges to make the legal rules genuinely accessible to jurors may reduce some of the turbulence in this unsettling area of the law.

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jury to have with them during their deliberations detailed instructions on the actual malice issue as well as a jury verdict form which "took the jury step by step through each of the theories on which plaintiff relied." Sofaer, *supra* note 1, at 2-3. In addition, the parties prepared a chart, at the judge's request, "list[ing] every exhibit in evidence, describ[ing] the exhibit in sufficient detail to enable the jur[ors] to identify the items they wished to see, and indicat[ing] the issue or issues on which each exhibit was admissible." *Id.* at 1-2.

[5] Judge Sofaer observed that the use of separate, seriatim verdicts in the *Sharon* case made it possible to avoid definitive rulings on unsettled questions of law, *e.g.*, whether "public figure plaintiffs were required to prove falsity by clear and convincing evidence." Sofaer, *supra* note 1, at 3. He also noted his decision to bifurcate the trial so that evidence on reputation and damages would not influence the decision on liability. *See id.* at 4. While the structure he employed worked effectively in *Sharon*, Judge Sofaer suggested that other cases might call for a different ordering, for example, "the judge could have the jury pass on actual malice first, when that issue appears potentially dispositive and susceptible of decision without confusion." *Id.* at 5.

En Banc *Dissent*

MACKINNON, *Senior Circuit Judge* (Dissenting). Rehearing *en banc* was granted in these cases to provide an opportunity for the full court to consider "issues of exceptional importance to the courts and to the public." *The Washington Post* Petition for Rehearing and Suggestion for Rehearing *En Banc* at 1. In particular, the petition suggested that, by viewing the underlying evidence of actual malice in the light most favorable to the verdict reached by the jury in this libel action, the panel opinion, reported at 759 F.2d 90 (D.C. Cir. 1985), failed to review independently the evidence of actual malice. *Post*'s Petition at 7-10. To give the court the opportunity *en banc* to consider this question, the parties were ordered to file supplemental briefs addressing, *inter alia*, "[w]hether, in determining the existence of clear and convincing evidence to support a jury finding of actual malice, an appellate court must view the evidence in the light most favorable to the plaintiff[.]"

Effectively conceding this issue, *Post* counsel at oral argument retreated from its position that an appellate court's independent review of the evidence of actual malice is "not dependent on anything below." Transcript of Oral Argument at 25 (October 3, 1985). *Post* counsel admitted that an appellate court's independent review of the evidence of actual malice must "pay some obeisance" to the jury's assessment of witness credibility. *Id.* at 26.

The *en banc* majority opinion, presumably because of *Post* counsel's admissions at oral argument, refuses to address the important First Amendment issue ordered for briefing in this case—that is, the extent to which judicial deference to jury determinations of contested facts and credibility is called for under *New York Times v. Sullivan*, 376 U.S. 254 (1964) and *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485 (1984). *See* Maj. Op. at 24-25. Reducing the conflict between the

parties to a primarily factual dispute, the *en banc* majority fails to heed the principle that "appellate review serves a dual purpose: the correction of legal error and the establishment of legal rules for future guidance. Only the latter is ordinarily worth the attention of the full court." *Church of Scientology of California v. Internal Revenue Service*, 792 F.2d 153, 155 n.1 (D.C. Cir. 1986) (*en banc*). The purpose for holding an *en banc* hearing —to establish legal rules for future guidance—has been forsaken by the majority in favor of a mere reversal of the panel opinion, in derogation of the rule that "[t]he function of en banc hearings is not to review alleged errors for the benefit of losing litigants." *United States v. Rosciano*, 499 F.2d 173, 174 (7th Cir. 1974) (*per curiam*).

Rather than addressing the important First Amendment question presented by this case, the majority instead rejects entirely plausible (if not inevitable) interpretations of the article and then, by considering only a small fraction of the defamation charged, holds the jury's verdict was invalid under what are alleged to be traditional judgment n.o.v. standards. In determining whether to grant judgment n.o.v., a reviewing court is "*required* to draw all inferences favorable to the plaintiff." *Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225, 1234 (D.C. Cir. 1984) (emphasis in original). "The weighing of conflicting evidence and the evaluation of witness credibility is exclusively within the jury's province." *Id. See U.S. Industries v. Blake Construction Co.*, 671 F.2d 539, 550 (D.C. Cir. 1982); *Vander Zee v. Karabatsos*, 589 F.2d 723, 726 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 962 (1979). After asserting that its review of the evidence in this case is made under "traditional j.n.o.v. standards," the majority discards those traditional standards and proceeds to make its own assessment of witness credibility and to disregard con-

trolling reasonable inferences in favor of the verdict.[1] Thus, although the majority insists that it is conducting a traditional j.n.o.v. analysis, it in fact reweighs the evidence, overrides obvious jury determinations on credibility of witnesses, generally goes only about half-way in giving plaintiff the benefit of the inferences to which he is entitled, and thus refuses to find the *underlying* facts, as required, in the manner most favorable to the jury verdict.[2]

I respectfully dissent because I believe that the majority, in proceeding as above set forth, has denied plaintiff his constitutional right to a jury trial and has improperly failed to conform to the First Amendment independent fact review as established by *Bose Corp. v. Consumers Union of the United States*, 466 U.S. 485, 511 (1984).

I. Counterstatement of Facts

This is an unusual libel case and a unique majority opinion. When *The Washington Post* article at issue is read as a whole with all its innuendo, as it must be, it charges that William Tavoulareas (hereafter also "William"), as *president of Mobil Oil Corporation*, violated

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[1] Chief Judge Wald, concurring in the judgment of the *en banc* majority, agrees that the majority does not apply the judgment n.o.v. standard with integrity. Concurring Op. at 1-2.

[2] The majority's failure to disclose the principles guiding its review, moreover, is especially unfortunate in a case such as this, where

> the predictability of decisions, which is of crucial importance in an area of law touching upon First Amendment values, is enhanced when the determination is made according to announced legal standards and when a body of public case law furnishes published examples of the manner in which these standards are to be applied.

Ollman v. Evans, 750 F.2d 970, 978 (D.C. Cir. 1984) (*en banc*), *cert. denied*, 53 U.S.L.W. 3837 (1985).

his fiduciary duty to the shareholders of the corporation by causing Mobil's assets and personnel to be used with *intent* to benefit his son, Peter, to the detriment of Mobil. The case thus largely turns on whether Tavoulareas established the falsity of that charge. A jury has already determined that William has sustained the burden of proving the falsity of the *Post* article; and an appellate court under j.n.o.v. standards may only overturn that determination if it finds that *no reasonable person* could have believed that William proved the falsity of the article. The facts which follow must be read with this principle in mind.

The business relationships that gave rise to this case began in early 1974, when Mobil, after an earlier decision to do so in 1973, bought a 30 percent interest in the Saudi Arabian Maritime Company ("Samarco"), a joint venture that had been formed a short time before by members of a powerful Saudi Arabian family, the Alirezas, and Fairfield-Maxwell Ltd., a Japanese company that managed ships (RE 2470). The Saudis were the majority shareholders in Samarco. After first refusing an offer to join Samarco, Mobil decided to buy a minority interest after strong indications arose that the Saudi government was going to give oil shipping preferences to Saudi-owned ships. It anticipated transferring operation of its fleet of oil tankers to Samarco in order to qualify for the expected shipping preference.[3] Ultimately, however, these preferences were never created by the Saudi government.

The Samarco partners[4] agreed to hire an outside independent firm to manage the ships that Samarco would

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[3] "[S]ome 12 or 14 other [oil] companies [were] establishing similar organizations. . . ." (Tr. 1090).

[4] The ownership of Samarco was ultimately divided as follows: the Alirezas, 45%; Prince Fahd, 15%; Mobil, 30%; Fairfield-Maxwell, Ltd., 10%.

operate because of the possible conflict of interest that might arise between Fairfield-Maxwell and Mobil over the selection of ships for transporting oil. A *Saudi* preference would also seem difficult to claim if Mobil was managing its own ships. Mobil suggested Atlas Maritime Company, a new venture being formed by Greek shipping executive George Comnas. Comnas had previously worked for a premier Greek maritime firm, C. M. Lemos & Co., where Peter Tavoulareas, a 24-year-old graduate with a Masters Degree in Business Administration from Columbia University, was also employed as a junior executive trainee in maritime operations. Peter had first approached Lemos in August, 1972 and on January 1, 1973, Peter began working there (Tr. 2385, 2387, 2451).

In the operating arrangement with the Saudis, Mobil agreed to "bareboat charter" its ships to Samarco (*i.e.*, charter the ships empty and unstaffed), and Samarco would in turn "time charter" them (*i.e.*, charter the vessels complete with crews and provisions) back to Mobil.[5] Crews and provisions for the ships would thus be obtained through Samarco.[6] In admiralty law, Samarco, "for many, if not most, purposes [as] the bareboat charterer is to be treated as the owner" of the chartered vessel. *Reed v. The Yaka*, 373 U.S. 410, 412

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[5] One of the defendants' principal witnesses, a former director of the shipping concern of Fairfield-Maxwell, Ltd., John Kousi, stated that such circuitous leasing, in contemplation of Saudi preference laws, "was a commonly understood business idea at the time," devised as a means to capitalize on an opportunity to make substantial profits by using surplus tankers laid up by the world-wide depression in oil (Tr. 3220-23, 3263, 3167), and that Atlas could operate ships at less cost than Mobil (Tr. 3246).

[6] Mobil stated that it wanted an independent shipping operation to avoid a conflict of interest between the shipping interests of Mobil and those of Fairfield-Maxwell, Ltd. (Tr. 3126). This point was well taken.

(1963). Thus, the contractual arrangement placed considerable responsibility upon Samarco for Mobil's ships. Samarco, for its part, arranged to obtain crews and provisions through its management firm, Atlas. As explained in a Mobil letter to Tyler of the *Post*, the "savings" to Mobil in the cost of operating its tankers "permitted Samarco to pay the management fee [to Atlas] without any cost to Mobil" (RE 2345).

Comnas, in setting up Atlas, asked two young coworkers at Lemos, Peter Tavoulareas and Ares Emmanuel, to join him as partners.[7] When Comnas told William in January 1974 that he was leaving Lemos and *might* ask Peter to join him later, William *immediately* notified Mobil's top executives and its Conflict of Interest Committee (Tr. 1515-21). Meanwhile William, Mobil's longtime Saudi oil expert, with Comnas as a consultant, proceeded to carry out Mobil's decision to join Samarco in the joint venture. When Peter left Lemos to join Comnas in August, 1974, William immediately took the steps required by Mobil's Conflict of Interest Committee and formally removed himself from *making decisions* regarding Atlas.[8] Such recusal con-

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[7] The ownership of Atlas under Comnas was ultimately divided as follows: Comnas, 57%; Peter, 38%; Emmanuel, 5% (RE 2472-73).

[8] In January, 1974, William Tavoulareas notified Mr. Warner, the Chairman of Mobil's Board of Directors, *immediately* after being so advised personally by Comnas on January 9, 1974 (Tr. 1277), that "there was a chance of [his son Peter] participating in some kind of a joint venture with Comnas" (Tr. 4135). At the time, Comnas was seeking to charter a vessel to Mobil (Tr. 1277). Shortly thereafter, the possibility of Peter joining Comnas was disclosed to George Birrell, Chairman of Mobil's Conflict of Interest Committee (RE 1458-61). The situation was subsequently discussed several times by the Conflict of Interest Committee and Chairman Warner. Procedures were approved under which William would be isolated from "decisionmaking," although, as was necessary

formed to the instructions of the Mobil Conflict of Interest Committee and was also fully disclosed to the Mobil Board of Directors.

Mobil, with the Samarco partners concurring, decided a year later, in 1975, after first giving Comnas an opportunity to improve his performance (Tr. 2266-67, 2325-26), to remove him from Atlas because of self-dealing, fraudulent practices, and dissatisfaction with his competence and performance (RE 1990-94). Emmanuel testified, based on firsthand knowledge, to facts that completely justified the termination of Comnas.[9] The Sam-

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given his responsibilities as president and his experience as Mobil's expert on Saudi affairs, "he could involve himself up to the decision level," and Warner so advised Comnas. The *Post* and the majority completely refuse to recognize this degree to which William was permitted to function and what was expected of him in this area (Tr. 1515-21). The organization of Atlas was completed in July, 1974 (Tr. 4427). "Peter joined Atlas [in] August 1974" (Tr. 4158). On August 2, 1974, William Tavoulareas wrote a letter stating, "I will not make decisions" (Tr. 4136). And on the same date Mr. Wolfe wrote a letter "notifying the people in the [Mobil] organization on a need to know basis of Peter's participation" (Tr. 4136).

[9] According to Emmanuel's testimony, Comnas was not at Atlas offices for any length of time (Tr. 2240, 2243). Comnas was off pursuing grandiose visionary projects (Tr. 2241, 2245); he could not be reached as he was traveling (Tr. 2247); he felt he could "do whatever he wanted without any regard to anybody" (Tr. 2244); he took $130,000 for salary and increased that by "expenses which could not be substantiated" (Tr. 2244); he would have deprived Samarco of their 5% discount on ship repairs, *"which would have gone to some other source"* (Tr. 2264) (emphasis added); and despite a conflict of interest as a stockholder in IOTRON he urged Atlas to buy ship equipment manufactured by IOTRON (Tr. 2265). Comnas also negotiated a deal with Japan Lines that would have been detrimental for Atlas if approved (Tr. 2250). Samarco and Mobil forced Comnas to reject it (Tr. 2256). In other words, the Samarco partners were completely justified in terminating Comnas' employment.

arco partners heard that Comnas was corrupt, that he had been implicated in a fraud scandal in Italy while he was with Exxon (RE 1990-91), and that as head of Atlas he had solicited a bribe from the Japanese during negotiations for Samarco's purchase of tankers from Japan Lines (Tr. 3187, 4152-53). Both Fairfield-Maxwell and the Saudis believed Comnas to be incompetent (Tr. 3184-85). In addition, the Saudi partners were particularly incensed by Comnas' racist attitudes towards Saudi workers (RE 1991-94, Tr. 1326-44). Following his dismissal from Atlas, Comnas was placed on Mobil's payroll as a consultant for three years, and Atlas reimbursed Mobil for his salary (Tr. 2270). He also obtained a consultancy with Atlas (Tr. 2270, 2308, 2337-38). Mobil sent Harmon Hoffmann,[10] an experienced Mobil shipping executive, to head up Atlas. Hoffmann was offered Comnas' share of Atlas stock (RE 2345, Tr. 4151), but turned down this offer to become the controlling equity partner, and after six months returned to Mobil, saying "he wouldn't make any money in Atlas" (RE 1353). Upon leaving Atlas, Hoffmann stated that Peter and Emmanuel were competent to run the operation (Tr. 1878). Peter Tavoulareas and Emmanuel then assumed the management duties of Atlas, which, despite the boxcar figures bandied about in the article, did not make a profit for the period from 1974 to 1979 (Tr. 2274). By 1979 it was operating 17 ships, including 7 for Samarco, only 4 of which were Mobil's.

The Mobil-Samarco-Atlas relationship, and the Tavoulareas-Atlas connection particularly, were explained to Mobil shareholders in a 1976 letter. At about the same time, a party or parties sent anonymous letters to a number of newspapers, alleging that the arrangement violated the United States securities laws. One of those letters went to reporter Robert Woodward of *The Wash-*

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[10] Hoffmann's name was incorrectly reported as Herman Hoffmann in the *Post*'s November 30 article.

ington Post. Woodward and reporters for several other newspapers investigated the anonymous charges; none of them apparently found any wrongdoing and no stories were published. The Securities and Exchange Commission, which obtained a copy of one of the letters, conducted an informal investigation and called upon William Tavoulareas to testify in non-public proceedings. The SEC also found no impropriety.

Evidence presented by the plaintiffs at trial showed that Mobil did *not* exert control over Samarco, in which Mobil was a 30% minority shareholder, and that all of the decisions relating to Atlas were approved by the controlling Saudi partners. The arrangement was fully disclosed to Mobil's Conflict of Interest Committee, Mobil's Board of Directors, and the company's shareholders.[11] Evidence indicates that Mobil and its shareholders benefitted from the Samarco-Atlas arrangement because Atlas operated the Mobil ships more cheaply than Mobil could have.

The *Post* article had its genesis five years after the creation of Atlas and three years after disclosure to the shareholders. The article was investigated and written by Patrick Tyler, who had previously written an article on the nation's oil crisis for which he was criticized by Mobil for misstating information given him by Mobil. Shortly after Mobil's criticism of the *Post* for its earlier

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[11] Although the majority asserts that "several of Mobil's outside directors raised objections to Peter's involvement in Atlas," Maj. Op. at 8, the record indicates that the one outside director who had originally expressed some reservations about the "appearance" of Peter's involvement in Atlas, Ambassador McGhee, questioned neither the business justifications nor the ethical validity of Mobil's entry into the Samarco-Atlas arrangement. Following the SEC investigation of William Tavoulareas that resulted in no charges of wrongdoing, McGhee stated: "Congratulations, Tav, I knew you'd be cleared." (Tr. 1813).

story by Tyler, Woodward gave Tyler his old file on Tavoulareas.

In October 1979, Samuel "Sandy" Golden, a reporter for a suburban newspaper, *The Montgomery* [Maryland] *Journal*, met Philip Piro, a physician who was married to William Tavoulareas' daughter. Piro was in the midst of a less-than-amicable divorce proceeding. Piro told Golden about the Atlas transactions. Golden testified that Piro told him that Mobil's President William Tavoulareas had set up his son Peter in the business, making Peter an "overnight millionaire" (Tr. 166). Piro mentioned that Woodward had previously investigated the story.

Golden, who had been angling for a job at the *Post* for some time, sensed a story. He unsuccessfully called Woodward several times and finally left a message that he "had a story about the president of Mobil setting up his son to become an overnight millionaire" (Tr. 169). Woodward, by then an editor at the *Post*, assigned reporter Patrick Tyler to return Golden's call. Golden told Tyler that he had a hot source for the Tavoulareas story. Tyler, who already had Woodward's file on the Tavoulareases, agreed that if Golden's source led to a big story, Golden would share a *Post* byline.[12] The two reporters met at The Owl restaurant in Baltimore, where they jointly interviewed Piro. Tyler apparently from the very outset treated Piro's story as completely true, despite Piro's obvious antagonism toward the Tavoulareases. On leaving the restaurant, Tyler remarked that it's "not every day you knock off one of the seven sisters"[13] (RE 789).

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[12] When the article appeared, Tyler was given sole byline credit for it, and Golden received credit as a "Special Correspondent" for the story.

[13] "Seven Sisters" is a colloquial term for the seven largest oil compainies, one of which is Mobil.

At this point, the two reporters began following separate trails. Golden concentrated on getting more information from Piro and conducted several telephone interviews with him. Although Golden repeatedly assured Piro that he was not recording their telephone conversations, he taped several of them. Golden also began seeking "possible enem[ies]" of Tavoulareas (Tr. 202). In his search, he met Peter Stockton, an investigator for Rep. John Dingell, Chairman of the House of Representatives Subcommittee on Energy and Power. Golden believed that Stockton, who had something of a reputation as a crusader, "hate[d] people with money" (Tr. 223). Golden played the Piro tapes for Stockton, who at some point relayed Golden's information to Congressman Dingell. Stockton later contacted Tyler and passed other information to him. Dingell wrote to the SEC seeking an investigation of Tavoulareas.

Tyler, meanwhile, tracked down Comnas and met with him in New York. Comnas, who initially requested anonymity, allegedly told Tyler about the Atlas arrangements. The *Post* contends that Comnas was the principal source for its stories. (Despite being listed as a witness by the *Post*, Comnas did not testify at trial, nor was his deposition introduced. Because Tyler does not use tape recorders, only Tyler's account of these important conversations with Comnas is available—a fact that severely weakens the *Post's* defense.) Tyler also talked to John Kousi, an executive of Fairfield-Maxwell, one of the Samarco partners. Parts of Kousi's deposition were admitted into evidence. Tyler requested personal interviews with William Tavoulareas and other Mobil executives, but generally was rebuffed because in his earlier story on the oil shortage he had misrepresented statements made to him by Mobil executives. Tavoulareas did, however, give written answers to questions that Tyler submitted in writing (RE 2343-46).

Tyler wrote the story, and the *Post* submitted it to its editing process. During editing, parts that were favorable to Mobil and Tavoulareas were deleted—chiefly opinions of various persons in and out of Mobil that (1) the Atlas arrangement had benefitted the company, and (2) William Tavoulareas had not been *directly* involved in Atlas after its formation. The *Post* copy editor assigned to the story, Christine Peterson, read the Tyler story (as it was ultimately published), considered its implications, and wrote a memorandum to other editors stating in effect that she found it "impossible to believe" that William Tavoulareas had arranged the *entire* Samarco-Atlas venture in order to benefit his son.[14] Tyler did not question this analysis and responded with a memo in which he acknowledged that "a good editor might say that part of our case against Tavoulareas seems *tenuous*" (emphasis added), and noted that a couple of "key points" were based on a single source—presumably Comnas. Neither the *Post* editors nor Tyler altered the story in response to Peterson's memo, and after clearance from the lawyers, Tyler's story as written was published in 600,000 issues of *The Washington Post* and sent over The Los Angeles Times-Washington Post News Service that is carried abroad and in *every* major city in the United States except Birmingham, Alabama —thus potentially reaching many millions of readers (Tr. 4015).

The first article appeared on November 30, 1979.[15] It bore the headline "Mobil Chief Sets Up Son in Venture," and its essential theme is made clear from its beginning:

> Mobil Oil Corp. president William P. Tavoulareas set up his son five years ago as a partner in a

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[14] *See infra* at 29 for the text of Peterson's memo.

[15] A second article was published on December 1, but the jury found that it did not defame either of the plaintiffs.

London-based shipping management firm that has since done millions of dollars in business operating Mobil-owned ships under exclusive, no-bid contracts.

The article detailed the transactions that led to the creation of Samarco and Atlas and when read as a whole, as it must be, implied that William Tavoulareas misused his corporate position as president and breached his fiduciary duties to Mobil to benefit Peter.

William and Peter Tavoulareas brought two actions: one for libel against The Washington Post Company [16] and several individuals including Tyler, Golden, and Woodward (collectively, the "*Post* defendants") (No. 83-1605),[17] and one for slander and republication libel against Piro (No. 83-1604). The Tavoulareases contended that the article was false and defamatory in implying that William breached his fiduciary duties to Mobil to benefit his son. After trial, the verdicts indicated the jury necessarily determined that:

1. In the November 30 article the *Post* defendants defamed William Tavoulareas. The premise of the article was false and was published with knowledge or reckless disregard of its falsity. (The jury awarded Tavoulareas $250,000 in compensatory damages and $1,800,000 in punitive damages against the *Post* defendants.)
2. The *Post* defendants did not defame Peter Tavoulareas.
3. Piro defamed both William and Peter Tavoulareas. (The jury awarded compensatory damages of $5,000 to William and $1,000 to Peter.)

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[16] The Washington Post Company is a large multimedia corporation which has substantial broadcast holdings and publishes magazines and newspapers, including the *Post*.

[17] Also named in the complaint was *Post* President Katharine Graham, but during trial the district court dismissed the case against her, and the plaintiffs do not contest this. Accordingly, she is not a party to this appeal.

After receipt of the verdicts, the district court set aside the jury verdict for William Tavoulareas and granted judgments n.o.v. for the *Post* defendants and for Piro. The trial judge ruled that Tavoulareas was a limited-purpose public figure and that there was no proof the defendants had acted in reckless disregard of the truth. While recognizing that "[t]he article in question falls far short of being a model of fair, unbiased, investigative journalism" the trial court concluded that "[t]here is no evidence in the record . . . to show that it contained knowing lies or statements made in reckless disregard of the truth." 567 F. Supp. at 654. The district court affirmed the jury verdict in favor of Peter Tavoulareas against Piro. On appeal the court reinstated the verdict, 759 F.2d 90 (D.C. Cir. 1985), one judge dissenting.[18]

II. The Standard of Review

The constitutional standard of liability for public figures[19] has been established by the Supreme Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). In addition to showing publication of a false defamatory statement, a public figure must show "actual malice," somewhat of a misnomer since it is defined as "clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity *or with reckless disregard for the truth.*" *Gertz*, 418 U.S. at 342 (emphasis added).

Under Rule 50(b) of the Federal Rules of Civil Procedure, a motion for judgment n.o.v. is essentially a

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[18] The panel denied rehearing and filed an opinion, 763 F.2d 1472 (D.C. Cir. 1985), but with Judges Tamm and Scalia voting to deny, the court ordered rehearing *en banc*.

[19] This opinion assumes, without deciding, that William Tavoulareas is a limited-purpose public figure.

motion for a directed verdict made after the jury has returned its verdict. Consequently, "the standard for awarding a judgment n.o.v. is the same as that applied when ruling on a motion for a directed verdict." *Vander Zee v. Karabatsos*, 589 F.2d 723, 726 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 962 (1979). Thus,

> [u]nless the evidence, along with all inferences reasonably to be drawn therefrom, when *viewed in the light most favorable to the plaintiff* is such that reasonable jurors in fair and impartial exercise of their judgment could not reasonably disagree in finding for the defendant, the motion must be denied.

Alden v. Providence Hospital, 382 F.2d 163, 165 (D.C. Cir. 1967) (emphasis added) (footnote omitted). In considering a motion for judgment n.o.v., the court ordinarily must abstain from weighing the evidence and assessing the credibility of witnesses. *Morelock v. NCR Corp.*, 586 F.2d 1096, 1104 (6th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979); 5A J. Moore, Moore's Federal Practice ¶ 50.07[2] (2d ed. 1986).

This deferential standard for reviewing jury determinations does not fully apply, however, in First Amendment defamation cases. In addition to the requirement that actual malice be proven with clear and convincing evidence, the Supreme Court held in *New York Times* that courts reviewing public figure defamation verdicts "must 'make an *independent examination* of the whole record,'. . . so as to assure [themselves] that the judgment does not constitute a forbidden intrusion on the field of free expression." 376 U.S. at 285 (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963)) (emphasis added); *see also Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 511 (1984). As the original panel opinion noted, it is necessary to reconcile the Supreme Court's instruction to review the evidence in a First Amendment defamation case independently with the well-settled standard, reiterated in *An-*

derson v. Liberty Lobby, —— U.S. ——, 54 U.S.L.W. 4755 (1986) (a limited-purpose public figure defamation case), that "[c]redibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict." 54 U.S.L.W. at 4759. *Cf. Crane v. Kentucky*, —— U.S. ——, 54 U.S.L.W. 4598, 4600 (1986). I remain of the view that this reconciliation is to be achieved by limiting appellate courts' independent review to the question of ultimate constitutional fact—*i.e.*, whether, assuming the most favorable facts and "legitimate inferences" that could reasonably have been found by the jury, the constitutional threshold of clear and convincing proof of actual malice was passed. Since, as has already been noted, the *en banc* majority does not address this legal question, I will not belabor it here, referring the reader to the discussion contained in the panel opinion, *Tavoulareas v. Piro*, 759 F.2d 90, 106-09 (D.C. Cir. 1985).[20] Upon reviewing the factual questions (other than the ultimate constitutional fact)—as the majority purports to do—on the basis of normal j.n.o.v. standards; and then, in addition—as the majority does not do—subjecting the ultimate question of clear and convincing proof of actual malice to independent review in the manner just described, I find it utterly impossible to conclude that this jury verdict can lawfully be set aside.

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[20] It might be added, however, that the reconciliation of independent review and deference to the fact-finder there set forth is in accordance with the reconciliation adopted by the Supreme Court in other First Amendment areas. For example, in Street v. New York, 394 U.S. 576 (1969), the Court conducted an independent review of the ultimate constitutional fact whether the appellant's words were "fighting words," so that the state could constitutionally punish their utterance. *See id.* at 592. In the process, however, the Court held that it must "consider[] [the evidence] in the light most favorable to the [verdict]." *Id.* at 590. *See also Bose*, 466 U.S. at 504-08.

III. Defamation and Falsity

A. *Defamatory Meaning*

To constitute actionable defamation, a published statement must be shown to be both defamatory and false. As the district court instructed the jury, a communication is considered defamatory if it "tends to injure [the] plaintiff in his trade, profession, or community standing, or lower him in the estimation of the community or subject him to scorn, ridicule, shame, contempt or embarassment" (Tr. 4548). *See Afro-American Publishing Co. v. Jaffe*, 366 F.2d 649, 654 (D.C. Cir. 1966) (*en banc*). In determining the meaning of an allegedly defamatory communication, the " 'publication claimed to be defamatory must be read and construed in the sense in which the readers to whom it is addressed would ordinarily understand it.' " *Washington Post Co. v. Chaloner*, 250 U.S. 290, 293 (1919) (citation omitted).

The respective roles of judge and jury are as follows: It is for the court to determine whether a particular communication is *capable* of bearing a defamatory meaning. " 'It is only when the court can say that the publication is not reasonably capable of *any* defamatory meaning, and cannot reasonably be understood in *any* defamatory sense, that the court can rule as a matter of law, that the publication is not libellous.' " *Gariepy v. Pearson*, 207 F.2d 15, 16 (D.C. Cir.) (citation omitted) (emphasis added), *cert. denied*, 346 U.S. 909 (1953); *McBride v. Merrell Dow & Pharmaceuticals*, 717 F.2d 1460, 1465 (D.C. Cir. 1983). It is thus for the jury to decide whether a communication, found capable of a defamatory meaning by the court, was in fact so understood by its recipient. *Restatement (Second) of Torts* § 614 (1977).

The majority goes about its task of determining whether the *Post* article is capable of any defamatory meaning by understating and *separately* considering each

of only three allegedly libelous statements taken out of context and by completely ignoring the basic theme of the article. The majority considers the defamatory implication of the "set up" charge in the *Post* article in an unreasonably narrow fashion, asserting that "[t]he statement that 'a father set up his son in business' would ordinarily mean to a reasonable reader that the father provided the son with [a business opportunity]." Maj. Op. at 31. In so defining "set up," the majority ignores the full meaning of those words in the article.[21] With respect to the "[personally] dispatched" charge, the majority concludes that although capable of a defamatory meaning (that Tavoulareas did not remove himself from dealings with Atlas), this statement carried no defamatory "impact" in light of Tavoulareas' other personal contacts with Atlas. Maj. Op. at 49. Finally, the majority concedes that the statement that William "personally urged" Comnas to include Peter in Atlas was defamatory (though ultimately not actionable because not uttered with actual malice). Maj. Op. at 50.

Such analysis by the majority of the defamatory meaning of the *Post* article is flawed both factually and as a matter of law. As a matter of law, the majority's analysis violates the cardinal principle of defamation law that "words must be read in the context of the entire communication *as a whole*." R. Sack, Libel, Slander, and Related Problems 52 (1980) (emphasis added). *See Pierce v. Capital Cities Communications*, 576 F.2d 495, 502 (3d Cir.), *cert. denied*, 439 U.S. 861 (1978) ("a court should not scrutinize simply the literal references of the language in question, but also should weigh the words 'together with their context,' Restatement, Second, Torts § 563, Comment (d)"); *Curtis Publishing Co. v. Vaughan*, 278 F.2d 23, 26 (D.C. Cir.), *cert. denied*, 364 U.S. 822 (1960); *Williams v. Anti-Defamation League*

[21] See, for example, the interpretation given the article by *Post* counsel at trial, *infra* at 29-30.

of B'nai B'rith, 185 F.2d 1005, 1007 (D.C. Cir. 1950). *Gariepy*, 207 F.2d at 16; *Thomson v. Cash*, 402 A.2d 651, 653 (N.H. 1979); *James v. Gannett Co.*, 40 N.Y.2d 415, 419, 386 N.Y.S.2d 871, 874, 353 N.E.2d 834, 838 (1976); *H.O. Merren Co. v. A.H. Bel. Corp.*, 228 F.Supp. 515, 518 (N.D. Tex. 1964), *aff'd*, 346 F.2d 568 (5th Cir. 1965); *Westby v. Madison Newspapers, Inc.*, 81 Wis.2d 1, 6, 259 N.W.2d 691, 693 (1977). *Cf. Ollman v. Evans*, 750 F.2d 970, 982 (D.C. Cir. 1984) (*en banc*) (a proper reading of an allegedly defamatory article "depends upon the article or column, *taken as a whole*, of which the statement is a part") (emphasis added). A court should not isolate particular words or sentences and determine whether, considered alone, they are defamatory. To be sure, the words used must be considered—but they must be considered in their context. Words that standing alone may be understood to be defamatory may be so explained by their context as to negate any defamatory meaning. Conversely, words that standing alone convey no defamatory meaning may, when read in context, be understood to be defamatory. The charges in this article were published in context and it is error for the court not to determine their meaning in that context. *The court's task is to determine whether the publication taken as a whole is defamatory. See Hoffman v. Washington Post Co.*, 433 F. Supp. 600, 602 (D.D.C. 1977), *aff'd*, 578 F.2d 442 (D.C. Cir. 1978); *Joseph v. Xerox Corp.*, 594 F. Supp. 330, 332 (D.D.C. 1984).

In addressing whether the article is capable of bearing a defamatory meaning, the majority creates an easy task for itself. In analyzing only a few of the defamatory statements and those out of context, the majority escapes confronting the basic defamatory theme of the article—that William Tavoulareas violated his fiduciary duty as president of Mobil and misused Mobil assets, personnel, property, and financing to advance the career of his son Peter.

The headline and lead sentence of the November 30, 1979 *Post* article charges that William Tavoulareas "set up" his son. The majority admits that the "set up" allegation is defamatory in accusing "Tavoulareas with nepotism—furthering his son's business career." Maj. Op. at 32. By reading narrowly the defamatory character of the "set up" charge and of the article as a whole, the majority finds that the defamatory "set up" allegation is true.[22] Maj. Op. at 40.

To construe the defamatory accusation as being limited to simple "nepotism" is farcical. The "set up" charge cannot be read in isolation to simply accuse a father of furthering his son's career. The defamation is far more extensive. Read in the context here where the father's ability to "set up" his son stems solely from his position as president of a large corporation, the term "set up" further connotes that the father exercised his powers as president to use corporate assets with *intent* to benefit his son in breach of his fiduciary duties to the corporation's shareholders.

The majority effectively reads Mobil out of the article, notwithstanding the fact that the article mentions Mobil over one hundred times and identifies William Tavoulareas acting as president of Mobil ten times. Without the Mobil involvement the article would not have been a page 1 story. There are numerous statements in the article that can only be interpreted as intending to convey to the readers that William clearly violated his fiduciary duty as president of Mobil, by making possible Peter's partnership in Atlas and thereafter using Mobil assets and personnel to ensure the financial success of Atlas. According to the article, William Tavoulareas used Mobil assets and personnel to give Atlas "millions of dollars in business operating Mobil-owned ships under ex-

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[22] As discussed *infra* at 36-43, the majority fails to credit all permissible inferences to Tavoulareas in holding the narrow "set up" allegation to be true—the jury could reasonably have found that Tavoulareas did not "set up" Peter in Atlas.

clusive, no-bid contracts," (Paragraph 1); to "provide[] Atlas with office space," (Paragraph 4); to "create work for Atlas at a time when the shipping industry was severely depressed," (Paragraph 5) and when "Mobil could have managed the Samarco fleet itself," (Paragraph 63); and then to "intervene[]" (Paragraph 79) by personally "forcing the resignation" (Paragraph 24) of Comnas and by "dispatch[ing]" Hoffmann, an officer from Mobil, to help run Atlas for six months (Paragraph 82), thus securing for Peter control of the company (Paragraph 76) (emphasis added). Moreover, the article specifically attributes Peter's partnership in Atlas to "the help of Mobil" (Paragraph 2). The *Post* story therefore does not merely accuse a father of nepotism, but charges that the father, as president of Mobil, accomplished the nepotism through breach of his fiduciary duties to Mobil.[23] The district court included this interpretation in its charge and instructed the jury to find whether, as William Tavoulareas' complaint contended, the articles reasonably implied:

> That [William Tavoulareas] breached his fiduciary duties to Mobil. That he wasted and misused assets of Mobil. That he wrongfully diverted such assets to Peter Tavoulareas for his benefit, and four, that he committed criminal acts.

(Tr. 4550).

By ignoring the article's defamatory implication that Tavoulareas misused Mobil assets and his position as president to advance Peter in Atlas, the majority quickly disposes of the defamatory allegation that Tavoulareas "dispatched one of his senior shipping executives, Her-

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[23] As discussed *infra* at 36-43, evidence at trial established that William Tavoulareas did not "set up" Peter in Atlas but rather acted purely in Mobil's interests. The article's implication that William breached his fiduciary duties to Mobil and wasted and misused assets of Mobil for Peter's benefit could thus have been found false by a reasonable jury.

man [sic] F. Hoffmann, to London to help run Atlas" (Paragraph 82). The majority admits that the "dispatch" allegation might be false, but attempts to obviate its defamatory effect by concluding that the statement adds no further defamatory implication to the charge that Tavoulareas set Peter up in Atlas, a charge the majority declares is true. Maj. Op. at 49. The allegation that Tavoulareas "personally dispatched" Hoffmann, however, is defamatory in its implication that Tavoulareas misused corporate personnel to insure the success of Peter's business venture.[24] The majority's handling of the "dispatched" allegation illustrates the complete refusal of the majority to reflect on the background of *corporate* involvement that is painted into the article as a whole by the numerous references to Mobil and William's position with Mobil, and the many suggestions that Mobil's assets and personnel were misused in the venture to benefit Peter.[25]

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[24] Both William Tavoulareas and Paul Wolfe, the Mobil executive with decisionmaking authority after William surrendered such authority with respect to Mobil-Samarco-Atlas, testified that Tavoulareas did not personally send Hoffmann to Atlas (Tr. 1098, 1440). The jury could therefore have reasonably concluded the defamatory "personally dispatched" charge was false.

[25] That the article is capable of this defamatory meaning is established by the fact that the general public interpreted the article to charge William with abuse of his position as a corporate official. For example, the *Service Union Reporter* (a newspaper for unionized public employees) published a cartoon depicting William as an indulgent father giving some Mobil ships to Peter "to play with." In an article accompanying the cartoon, Peter's position in Atlas was directly attributed to "Daddy Tavoulareas . . . pull[ing] more than a few strings to put his son in the captain's chair of a shipping empire." (RE 1560-66, 2542). One former Commissioner of Internal Revenue called the *Post* article a story of "corporate incest . . . [meaning] the relationship between the corporation and family members, or other corporations controlled by family members" (Tr. 1875). That the *Post*'s readers inter-

It is instructive to compare the refusal of the *en banc* majority to acknowledge that the *Post* article can reasonably be given this interpretation with this court's opinion in *McBride v. Merrell Dow & Pharmaceuticals*, 717 F.2d 1460 (D.C. Cir. 1983). In that case Dr. McBride, who had been an expert witness in a Florida lawsuit, brought a suit claiming that he was libeled by an article containing the following language: "McBride . . . was paid $5,000 a day to testify in Orlando. In contrast, Richardson-Merrell pays witnesses $250 to $500 a day, and the most it has ever paid is $1,000 a day." *Id.* at 1462. Dr. McBride contended that this language was defamatory because it implied that he was " 'willing to prostitute his professional expertise and testify on behalf of the highest bidder.' " *Id.* at 1463 (quoting Dr. McBride's Complaint). The district court agreed with the defendant that this language was not defamatory, concluding that standing alone it suggested, if anything, that Dr. McBride possessed a high degree of professional accomplishment, and that it was "improbable" that anyone would draw defamatory inference from this language. *McBride v. Merrell Dow & Pharmaceuticals*, 540 F. Supp. 1252, 1255 (D.D.C. 1982). We reversed. Stressing the fact that, "[u]nder District of Columbia defamation law, a court's power to hold as a matter of law that a statement is not defamatory is very limited," 717 F.2d at 1465, we concluded that the language could reasonably have been understood to imply that Dr. McBride's testimony was for sale.

It seems to me impossible to reconcile the approach of the *en banc* majority in this case with *McBride*. Surely the distance between the simple statement that one expert witness was paid significantly more than other witnesses and the inference that that witness'

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preted the article to chronicle a corporate president's violation of his fiduciary duties simply cannot be denied.

testimony was for sale is far greater than the distance between the statement that the president of a corporation set his son up in a business with which the corporation then did substantial business and the inference that the president thereby misused corporate assets and breached his fiduciary duties to the corporation's shareholders.[26] Moreover, the *Post* article, unlike the article at issue in *McBride*, contains other language likely to induce a reader to make the defamatory inference.

While ignoring the article's defamatory implication that William Tavoulareas abused his position as president and violated his fiduciary duties to Mobil in prodding Peter's fortunes in Atlas, the majority eliminates another aspect of the article's central theme that Tavoulareas abused his corporate position, concluding "as a matter of law" that the article is incapable of bearing the defamatory "interpretation that Tavoulareas 'set up' the entire Mobil-Samarco-Atlas relationship to benefit

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[26] Seeking to distinguish *McBride*, the majority asserts that that decision "does not bear upon . . . *which* of two defamatory meanings the [set up] statement in our case bears." Maj. Op. at 36 n.23. The majority assumes that by finding that the "'set up' statement dafames Tavoulareas by charging him with nepotism," (a charge that the majority later finds is true), it can escape comparison to *McBride*. It is submitted, however, that *McBride* does illuminate the instant "dispute . . . over the sweep of the [set up] statement." Maj. Op. at 36 n.23. In *McBride* we did not narrowly interpret the article's fee comparison to merely accuse Dr. McBride of charging unreasonably high fees. Rather, we held that the article's statements on the expert witness fees were capable of a much broader defamatory meaning in that they could reasonably be read to imply that Dr. McBride's testimony was for sale to the highest bidder. It is consistent with our interpretation of the defamatory statement in *McBride* to read the "set up" allegation here as capable of bearing the defamatory meaning that Tavoulareas misused corporate assets and breached his fiduciary duties to the corporation's shareholders by "setting up" Peter in Atlas.

Peter." Maj. Op. at 32.[27] Failing to consider the article as a whole, the majority rejects this interpretation because nothing in the article specifically alleges that Tav-

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[27] Contrary to the majority's protestations otherwise, Maj. Op. at 28 n.16, there is an obvious distinction between the article's accusation that Mobil joined Samarco once it occurred to William Tavoulareas that Mobil's entry into Samarco could ultimately benefit his son and the charge that, after Mobil decided to enter Samarco, William wasted and misused Mobil assets, financing and personnel to prod his son's fortunes in Atlas. While both are aspects of the article's central defamatory theme that William violated his fiduciary duties as president of Mobil to benefit Peter, the charges are separately defamatory. The article's charge that William's actions with respect to *Atlas* violated his fiduciary duties remains even if the majority's extreme contention were correct that the article cannot be read to attack Mobil's motives for entering *Samarco*.

The majority criticizes the foregoing analysis of the article's defamatory meaning as one not advanced by Tavoulareas. *Id.* The majority's attack completely ignores that the district court charged the jury to find whether, as "*William Tavoulareas, in his complaint contend*[*ed*] . . . the articles reasonably imply . . . [t]hat he breached his fiduciary duties to Mobil . . . wasted and misused assets of Mobil . . . [and] wrongfully diverted such assets to Peter for his benefit." (Tr. 4549-50) (emphasis added). Moreover, the district court, in its memorandum accompanying the order of judgment n.o.v., considered Tavoulareas' argument that the article implied that William "put together the Mobil-Atlas-Samarco arrangement solely for the sake of his son," 567 F. Supp. at 660, separately from Tavoulareas' argument that the "article impliedly accused him of misusing Mobil's assets." *Id.* Finally, in the decision reinstating the jury verdict, the panel wrote:

> the article could reasonably be read to suggest that William Tavoulareas became involved with Atlas-Samarco primarily to benefit his son. . . . At a minimum, the article implies that, *irrespective of the motivation for creating the Mobil-Atlas-Samarco relationship, William misused Mobil assets and his position as president to advance his allegedly undeserving son—an act of corporate nepotism.* Indeed, this interpretation of alleged

oulareas "set up" the entire arrangement for Peter's benefit and because the article discusses Mobil's business reasons for participating in Samarco. Maj. Op. at 33-34.

The entire discussion of the legitimate business reasons in the *Post* article is pejorative, however, suggesting that although they were asserted by Mobil, these business reasons fail to explain the Mobil-Samarco-Atlas arrangement.[28] For example, although it quotes Mobil's state-

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nepotism was recognized by the district court as the basic theme of the article. 567 F. Supp. at 660.

759 F.2d at 111 (emphasis added). Quite clearly, the defamation analysis employed here is not new.

Also erroneous is the majority's contention that the defamatory implication that William Tavoulareas abused his fiduciary duties and misused corporate assets fails to add anything to the article's charge of nepotism. Even if one accepts, *arguendo*, the majority's conclusion that William Tavoulareas "made it possible for Peter to become a partner in Atlas and then helped to ensure that the business would prosper because Peter was his son," Maj. Op. at 32, the majority offers no evidence whatsoever that William Tavoulareas wasted Mobil assets, financing or personnel to the detriment of Mobil shareholders.

Rather than conceding that Tavoulareas' actions were nepotistic, it is pointed out *infra* at 36-43 that the evidence is far from undisputed that William made it possible for Peter to become a partner in Atlas. Even less so is there evidence that William abused his corporate position and wasted Mobil resources in his dealings with Atlas. Not only does the majority fail to give this defamatory implication of the article the consideration it warrants, but the majority also dismisses evidence supporting this interpretation because the evidence does not sustain the *separate* defamatory implication that Tavoulareas engineered the entire Mobil-Samarco-Atlas venture to benefit Peter. *See, e.g.*, Maj. Op. at 37 n.24. The majority's odd tactic is, to say the least, unfair.

[28] Indeed, Tyler himself so interpreted his article by stating in writing that "[o]ur story does show that Mobil's decisions in this case were not made for the traditional business reasons or for the reasons stated by Mobil." (RE 2489).

ment that Samarco was formed in anticipation of the Saudi flag preference regulations, the article throws cold water on the argument that this was the real reason by asserting that the "creation of Atlas was a marked departure from Mobil's historical practice of managing its own fleet of crude oil tankers through its shipping and transportation division." (Paragraph 8). In the same vein, without recognizing that the essence of the Samarco-Atlas plan was conceived by Mobil before Comnas ever came into the picture and was beneficial to Mobil, the article charges that the real purpose of the plan was a "make-work" scheme for Peter's benefit to "create[] work for Atlas [while Peter had an equity interest] at a time when the shipping industry was severely depressed." (Paragraph 5). Similarly, after quoting Mobil's statement that selection of a ship management company depends more on safety than on price, the article notes that Atlas had recently lost a ship in a fire accident, as if to suggest that some unstated reason other than safety must have been the real reason why Atlas was selected (Paragraphs 67, 68). In fact, the ship was in dry-dock at the time, outside Atlas' control. Thus, the article throughout implies that Mobil suffered from the Samarco-Atlas transaction—an assertion for which there is not a bit of evidence. In fact, Mobil benefited.

When read in the context of the article as a whole, the "set up" accusation could reasonably be read to suggest that William engineered the *entire* Mobil-Samarco-Atlas arrangement to benefit Peter. For example, the article comments that Mobil was originally not interested in participating in Samarco, but only later became interested (Paragraphs 50-51). The article then notes that Comnas, one of the negotiators sent by Mobil "to push Mobil as a partner" in Samarco, was also "recruited personally by Tavoulareas to advise Mobil on how to set up an independent shipping concern." (Paragraph 51). The

article further states that Tavoulareas recommended to the Samarco partners that Comnas run the management arm of Samarco. Tavoulareas is then said to have "personally urged that his son become a partner in Atlas." (Paragraph 52). These details in the article could reasonably be read to imply that Mobil's entry into Samarco was motivated by Tavoulareas' intention that Comnas, who would negotiate the Saudi deal for Mobil, would later run Samarco's management arm and offer Peter a partnership in the company. The majority, failing to recognize that the decision to enter Samarco was contemporaneous with the decision to establish a separate company to manage Samarco's ships, strips away an integral part of the defamatory meaning surrounding the "set up" allegation.

The majority's cavalier rejection of the article's defamatory meaning that Tavoulareas engineered the entire Mobil-Samarco-Atlas arrangement for Peter's benefit as a "matter of law" is at odds with the *McBride* rule that a court's power to hold as a matter of law that a statement is not defamatory is limited to those occasions where the " 'publication is not reasonably capable of any defamatory meaning and cannot be understood in any defamatory sense.' " 717 F.2d at 1465 (citations omitted). Given evidence that the article was in fact "understood in [the] defamatory sense," *McBride*, 717 F.2d at 1465, that William Tavoulareas' nepotistic intent prompted Mobil's entry into the Samarco-Atlas arrangement, the majority's conclusion as a matter of law that the article does not, and cannot, bear the defamatory meaning that Tavoulareas "set up" the entire Mobil-Samarco-Atlas relationship to benefit Peter is all the more unjustifiable.

For example, Christine Peterson, a copy editor at the *Post*, reviewed the article prior to publication. She sent a memorandum to assignment editor Peter Milius, which stated:

> I've read the Mobil story several times, and while I'm impressed with the amount of work the reporter obviously did, I'm still left with an overwhelming sense of So What? Is there any way to give this story of high-level nepotism a dollars-and-cents angle? Did Mobil's shareholders lose anything? Mobil's customers?
>
> *Parts of Tyler's case against Tavoulareas seem tenuous, and the whole—a $680,000-a-year plaything for an indulged son, at worst—just seems like a withered peanut in an 84" gilded shell.*
>
> A far more interesting angle, it seems to me, is Mobil's concern about Saudi preference shipping—a concern so profound that it led to the formation of an entire dummy corporation. *It's impossible to believe that Tavoulareas alone could put together such a scheme for the sake of his son's business career, or that he would want to.*

(RE 2486) (emphasis added). This indicates that Peterson interpreted the article as a whole to charge that William engineered the entire Mobil-Samarco-Atlas transaction as "a scheme for the sake of [Peter's] business career."

Moreover, *Post* trial counsel in his closing argument to the jury positively and extensively interpreted the article in a similar manner:

> I suppose, ladies and gentlemen, when you get right down to it the thing that Mr. Tavoulareas most vigorously complains of is the term "set up" in the headline and the lead of the story.
>
> Well, lend me your ears for two or three minutes and let's talk about the headline and the lead.
>
> By now, I dare say it is clear to everybody in the courtroom that what happened was that Mr. Tavoulareas, seeing a good business reason *to go into the Samarco venture*, and seeing a good business reason *to have an independent ship management firm* run those ships, *took advantage of those good business*

> *reasons to see to it that his son, Peter, was set up for the rest of his life.* That is what he did, and the mechanism, the device by which this was done was setting up Atlas, putting Comnas in charge, but with Peter with him as a partner, and then in three or four months *seeing to it* that Comnas is out of the picture, leaving Peter in there as the major partner with Ares Emmanuel as a minor partner. *That is what he did.*
>
> He did, as I understood Mr. Tavoulareas' testimony, while he wouldn't like the words that I used as to each event that took place in sequence, there is no real dispute these are the things that happened.
>
> *Samarco was set up.* Atlas was set up. There was an Atlas/Samarco contract. Comnas and Peter took on the Atlas operation, and in April of 1975 Comnas was induced to resign. Remember those consulting contracts and the rest of it?
>
> Now, the question is: How do you describe *all* of this? How do you describe it so that someone coming to it for the first time understood it? What words do you use to make it clear and to make it interesting to the newspaper reader?
>
> And the words that Pat Tyler settled upon were not unusual words, words that people use all the time. *The words were "set up."*
>
> . . . .
>
> I submit to you, ladies and gentlemen, that ["set up"] is a perfectly accurate way of describing the facts of the relationships among William Tavoulareas, Peter Tavoulareas, Mobil, *Samarco* and Atlas.

(Tr. 4491-94) (emphasis added). Here *Post* counsel repeatedly characterizes the article as alleging that William intended, when he "took advantage" of the situation and "set up" *Samarco*, Atlas, and the Samarco-Atlas contract, to have Peter "set up for the rest of his life." [29]

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[29] The majority seeks to avoid the conclusion that the article implies Samarco was "set up" for Peter by emphasizing the

This is the *Post*'s interpretation of its own article and the theory of its defense at trial. The majority now ignores this interpretation. For the *Post* and the *en banc* majority to assert that the article is incapable of the interpretation given it by *Post* counsel at trial violates the rule that a party on appeal is bound by its theory of the case argued below. *See, e.g., Alexander v. Town & Country Estates*, 535 F.2d 1081, 1082 (8th Cir. 1976); *Empire Life Insurance Co. v. Valdak Corp.*, 468 F.2d 330, 334 (5th Cir. 1972).

The majority deems that this evidence of how the article was interpreted is irrelevant to its consideration of the article's defamatory meaning. Maj. Op. at 35. In so concluding, however, the majority ignores the principle that "[t]he meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express." *Restatement (Second) of Torts* § 563 (1977). That Christine Peterson and *Post* trial counsel understood the article to charge William Tavoulareas with setting up Samarco and Atlas for Peter's benefit makes unsupportable the majority's discarding of this interpretation "as a matter of law."

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portion of the *Post*'s closing argument that acknowledges there were "good business reasons to go into the Samarco venture." Maj. Op. at 38 n.25. While assuming that the article's mention of good business reasons for Mobil to enter Samarco precludes an inference from the article that Samarco was "set up" for Peter, the majority ironically concludes that Peter was "set up" in Atlas, despite evidence of good business reasons for Atlas to manage Samarco's ships. The majority cannot have it both ways—either the existence of "good business reasons" precludes a "set up" charge or it does not.

Moreover, the majority's attempt to excuse the language used by *Post* counsel as "a single passage," Maj. Op. at 37-38 and uttered in the "heat of closing argument," *id.* at 38 n.25, carries little force given the tremendous importance and forethought associated with summation to the jury.

In avoiding the article's defamatory implications, the majority charges the dissent with a "tortured attempt to discern some dark, hidden meaning in the 'tone' of the article." Maj. Op. at 34. The article's implication that William Tavoulareas' nepotistic intent prompted Mobil's entry into the Samarco-Atlas arrangement is not, as the majority asserts, "hidden." The interpretation of the article offered by the dissent is that which Patrick Tyler himself ascribed to the story. In a telephone conversation prior to publication of the article, Tyler said to Peter Tavoulareas:

> I will tell you what I think. I have read the files and am more familiar with this than anyone. I think your father set up Atlas and Samarco and that . . . [Peter interrupts].

(Tr. 4369). Tyler's belief that William Tavoulareas "set up Atlas and Samarco" for Peter's benefit surfaced in his article. *See supra* at 26-28. Moreover, Tyler interpreted the meaning of the news article in a memorandum to his *Post* superiors. Responding before publication to Christine Peterson's critical comments, Tyler wrote:

> Mobil undertook some incredibly fancy corporate footwork in the wake of the embargo to apparently accomplish two things: ingratiate itself with the Saudis . . . and set up the son of Mobil's president in a shipping business when business was bad and the business therefore stood little chance of prospering without Mobil's help.
>
> * * *
>
> Our story does show that Mobil's decisions in this case were *not* made for the traditional business reasons, or for the reasons stated by Mobil.
>
> * * *
>
> It should not seem impossible that Mobil—which originally turned down a chance *to join Samarco*—changed its mind [on joining Samarco] after it

> dawned on Mobil's president that such a partnership would justify the creation of a small management firm at a time when Tavoulareas' son was aspiring to such a career and was already at work with one of the Greek shippers. *Samarco* can be seen as nothing more complicated than a slight diversion from Mobil in the way it moved its crude oil from point A to point B.
>
> The question of "*why*" Mobil's president would want to orchestrate such a diversion [to *Samarco*] when it would benefit his son's business career is begging things a little.

(RE 2488-90) (emphasis added). Thus, in addition to the interpretation of the article by the *Post* editor Peterson and the *Post* trial attorney, Tyler himself interpreted his article as attributing Mobil's entry *into Samarco* to Tavoulareas' nepotistic intent "to benefit his son's business career . . . after [that idea] dawned on Mobil's president." *Id.* The article, Tyler states, answers the basic subjective question " 'why' Mobil's president would want to orchestrate [the] diversion [of Mobil's shipping to Samarco]," and the answer the article provides is that William Tavoulareas intended "[to] benefit his son's business career . . . ." *Id.* The majority refers to the attention devoted in the article to Mobil's legitimate business reasons for creating Samarco, but even Tyler in his memorandum recognizes that the discussion of valid business reasons in the article was meant to disparage: "[O]ur story does show that Mobil's decisions in this case were *not* made for the traditional business reasons, or for the reasons stated by Mobil" (RE 2489) (emphasis added).

Tyler's contemporaneous interpretation of the article he had written is powerful evidence that the article is *best* understood as implying that Mobil's entry into the Samarco-Atlas arrangement was prompted by William Tavoulareas' nepotistic intent—it is virtually dispositive

evidence that the article could *reasonably* be so understood. Nevertheless, the *en banc* majority asserts that Tyler's memo is irrelevant because "[n]othing in law or common sense supports saddling a libel defendant with civil liability for a defamatory implication nowhere to be found in the article itself." Maj. Op. at 35.

Such a myopic conclusion, however, ignores the principle that "defamatory imputation may be made by innuendo." *Restatement (Second) of Torts* § 563(c). *See McBride*, 717 F.2d at 1465; *Sellers v. Time, Inc.*, 423 F.2d 887 (3rd Cir.), *cert. denied*, 400 U.S. 830 (1970); *Marcone v. Penthouse International*, 533 F. Supp. 353 (E.D. Pa. 1982); *Mihalik v. Duprey*, 11 Mass. App. 602, 417 N.E.2d 1238, 1239 (1981); *Thomson v. Cash*, 119 N.H. 371, 402 A.2d 651, 654 (1979). Only by blinding itself to the defamatory implications Tyler himself ascribed to the article, and the clear innuendo of the article, can the majority conclude that the article did not charge Tavoulareas with setting up the Mobil-Samarco-Atlas scheme for Peter's benefit.[30] The majority's rejection of this defamatory interpretation as a

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[30] In attempting to justify its refusal to consider the defamatory implications of the article, the majority makes the remarkable suggestion that defamation by implication cannot exist in an article that contains explicit statements unfavorable to the libel plaintiff. *See* Maj. Op. at 34 n.21. Although the majority quotes selectively from the article to illustrate what it considers the "thrust of the piece"—*i.e.*, Peter's "meteoric rise to partnership in Atlas was an act of favoritism," *see id.*—the majority astonishingly ignores huge portions of the article that concern only Mobil's relationship with *Samarco* (Paragraphs 8-11, 39-52, 55-59). These portions of the article, read in the context of the whole story of "favoritism" (as the majority describes it), imply that William Tavoulareas reversed Mobil's original decision and set up the entire Mobil-Samarco-Atlas arrangement for Peter's benefit. This defamatory implication is undeniably present, in addition to and notwithstanding the explicit statements in the article addressing Peter's "meteoric rise."

matter of law rests on mere assertion and is contradicted by the article itself and the evidence referred to.[31]

The defamatory meaning that the *en banc* majority does recognize is in a narrowly construed "set up" charge. The majority characterizes the "set up" charge as a defamatory accusation "that Tavoulareas made it possible for Peter to become a partner in Atlas and then helped to ensure that the business would prosper because Peter was his son." Maj. Op. at 32.

Consistent with its strategy to interpret the defamatory meaning of the article in an unreasonably narrow manner, the *en banc* majority insists that the article's false defamatory statement that "Tavoulareas personally urged that his son be included as an equity partner in Atlas"[32] is unrelated to the "set up" allegation. Maj. Op. at 30 n.17. The majority's isolation of the "personally urged" statement from the "set up" statement cannot be supported by the plain language of the article and illustrates the majority's refusal to consider the article as a whole.[33] In context, the two statements are

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[31] In light of the evidence at trial establishing that William Tavoulareas' involvement in the Samarco-Atlas arrangement was in Mobil's interest and with the concurrence of other top Mobil officials, *see infra* at 36-43, a reasonable jury could have found false the article's defamatory implication that Tavoulareas engineered the Mobil-Samarco-Atlas scheme for Peter's benefit.

[32] William Tavoulareas denied ever urging that his son be included in Atlas (Tr. 1293-94, 1296-97, 1433).

The majority concedes, as it must in viewing the evidence most favorably to Tavoulareas under j.n.o.v. standards, that a jury reasonably could have found the "personally urged" charge to be false. Maj. Op. at 50.

[33] Why the majority attempts to have the two charges considered separately becomes evident in its discussion on actual malice. After finding the "set up" allegation to be defamatory but true and the "personally urged" statement to be defamatory and possibly false, the majority assumes *arguendo* that

part of the same allegation [34]—in the majority's words, that "Tavoulareas made it possible for Peter to become a partner in Atlas." Even if the "set up" allegation is divorced from the "personally urged" statement, however, there remains ample cause for a reasonable jury to find this narrowly construed "set up" allegation false.

B. *Falsity*

To conclude that the "set up" charge is true, the majority claims reliance on "undisputed evidence of Tavoulareas' personal involvement in the establishment and operation of Atlas to Peter's manifest benefit." Maj. Op. at 46. The evidence upon which the majority relies, however, does not establish the truth of the "set up" charge as interpreted by the majority—*i.e.*, that "Tavoulareas made it possible for Peter to become a partner in Atlas and then helped to ensure that the business would prosper because Peter was his son." Maj. Op. at 32. For example, the majority claims that "the undisputed fact that Tavoulareas *personally* recruited Comnas

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Christine Peterson's "memorandum is evidence of 'serious doubt' or actual malice." Maj. Op. at 62. The majority concludes, however, that Tavoulareas could not "connect Peterson's disbelief to a false and defamatory meaning present in the article" because the "set up" allegation was found true. Of course, if the "personally urged" statement had been properly read as part of the "set up" charge that "Tavoulareas made it possible for Peter to become a partner in Atlas," the majority would have been confronted with a false defamation that *was* published with actual malice. *See* Maj. Op. at 63 ("the [Peterson] memorandum could be interpreted . . . to express disbelief that Tavoulareas "set up" Peter in Atlas"). By declaring the "personally urged" and "set up" allegations unrelated, the majority attempts to sidestep an actionable libel. The article, however, must be interpreted as a whole.

[34] The district court recognized that the two statements are related. In concluding that the "set up" allegation was not a lie, the trial judge relied on Comnas' statement that Tavoulareas had urged Comnas to bring Peter into Atlas. 567 F. Supp. at 659.

to manage Samarco's ships . . . shortly after learning that Peter had an outstanding offer from Comnas goes far toward justifying the charge that Tavoulareas 'set up' his son in Atlas." Maj. Op. at 42 (emphasis in original).

In reaching this conclusion, however, the majority ignores the following crucial evidence:

- Rawleigh Warner, Chairman of Mobil, testified that when Comnas came to New York in January 1974, seeking to charter a ship to Mobil, Warner remarked that "George Comnas would be an absolute natural" to manage the partnership's tankers in the event Mobil entered an agreement with the Saudis and Fairfield-Maxwell (Tr. 1515). Thus, by the time Tavoulareas and Walter MacDonald, then regional director of Mobil's Middle East Department, asked Comnas in the spring of 1974 whether he was interested in managing Samarco's ships (RE 2444), there was a consensus at Mobil with Warner's earlier observation that Comnas was a good choice for the task. The majority's assertion that Tavoulareas "*personally* recruited Comnas," Maj. Op. at 42 (emphasis in original), simply does not prove anything beyond the fact that Tavoulareas *acted on Mobil's behalf* when he later visited Comnas.[35]

[35] Twisting the evidence that William Tavoulareas had told Warner that Mobil was seriously considering joining Samarco and that Comnas was going to ask Peter Tavoulareas and Ares Emmanuel to join his new venture (Tr. 1514-15), the majority torturously concludes that William stated "Comnas was likely to be tapped to manage Samarco's ships." Maj. Op. at 41 n.29. The majority then attempts to discount Warner's testimony that he thought of asking Comnas to manage Samarco's ships, claiming that "Warner was merely reacting to Tavoulareas' statement"—a statement which Tavoulareas never utttered. Of course, the assessment of what Warner *meant* by his "absolute natural" statement is a determination to be made by the jury and not by a court claiming to review the verdict under judgment n.o.v. standards.

- Before Rawleigh Warner suggested Comnas as "an absolute natural" to manage the ships, he was fully informed by Tavoulareas that Comnas was going to ask Ares Emmanuel and Peter to come to work for him. Peter, however, had not accepted a position in Comnas' company. Aware that Comnas might try to curry favor with Mobil, Warner and Tavoulareas both talked to the chairman of Mobil's Conflict of Interest Committee about Peter's possible affiliation with a company that might be doing business with Samarco. An arrangement was set up that would avoid a conflict of interest if Peter decided to accept Comnas' offer (Tr. 1515-18).
- William Tavoulareas counselled Peter against leaving Lemos to join Comnas' new company (Tr. 1297, RE 2426).
- Warner testified that "Tav did nothing personally to further the affairs of Peter in [Atlas]." (Tr. 1539).

Given the abundant evidence of Mobil's interest in an independent shipping concern to manage Samarco's ships, and in one headed by Comnas in particular, the fact that Tavoulareas asked Comnas if he was interested in managing Samarco's ships does not establish the truth of the charge that "Tavoulareas made it possible for Peter to become a partner in Atlas." Maj. Op. at 32. To the contrary, the evidence shows that Tavoulareas acted to carry out a decision made by Mobil for its benefit, and with great care to avoid possible conflicts of interest in the event that Peter, against his father's advice, decided to join Comnas. In sum, the evidence is far from undisputed and does not support the accusation that William Tavoulareas "made it possible for Peter to become a partner in Atlas."

The majority further attempts to support the truth of the "set up" allegation by citing evidence for the

charge that Tavoulareas "helped to ensure that [Atlas] would prosper because Peter was his son." Maj. Op. at 32. Relying on evidence that Tavoulareas helped Atlas to "secure its management agreement with Samarco," Maj. Op. at 44, and to "survive [and] prosper after Comnas left," Maj. Op. at 45, the majority determines that the "set up" allegation is true. The majority, however, fails to acknowledge that due to Mobil's and Fairfield-Maxwell's possible conflicts of interest and the Saudi's inexperience in ship management, Mobil was soundly committed to having an independent company manage Samarco's ships (Tr. 1515, 1518). Moreover, it was in Mobil's interests for Atlas and Samarco to reach agreement quickly (Tr. 1311). Thus, to the extent Tavoulareas "helped Atlas secure its management agreement with Samarco," he was acting in Mobil's interests to implement a Mobil decision.

Furthermore, the majority mischaracterizes William Tavoulareas' involvement with Atlas. After Peter decided in July 1974 to join Comnas, William formally removed himself from decisionmaking regarding Atlas (Tr. 1521, 1525). Although the majority cites meetings between Tavoulareas and the Alirezas as evidence of the truth of the "set up" allegation, Maj. Op. at 43, these meetings were fully consistent with the decision of the Conflict of Interest Committee and Rawleigh Warner that "Tav could involve himself in activities up to the decision level but he could not make that decision" (Tr. 1521). Of course, as *president* of Mobil and its longtime expert on Saudi affairs, Tavoulareas' ability to carry out decisions made by the company was not required to be completely lost. He was free to negotiate on Mobil's behalf (Tr. 4159). The jury could reasonably have concluded that Tavoulareas' forthright communication to Mobil's Conflict of Interest Committee immediately after he first acquired knowledge of a *possible* conflict of interest, his formal removal from decisionmaking months

later when Peter joined Comnas, and the absence of *any* evidence showing that William made any *decisions* regarding Atlas after formally removing himself, negated the charge that he was acting on Peter's behalf.

Finally, the majority offers Tavoulareas' involvement in the events surrounding Comnas' departure from Atlas as establishing the truth of the "set up" charge. Maj. Op. at 44-46. Again the majority refuses to recognize that Tavoulareas complied with Mobil's conflict of interest guidelines and did not make any decisions concerning Atlas and Samarco after Peter joined Comnas. Paul Wolfe testified that it was he who recommended to Mobil Chairman Rawleigh Warner (in the presence of William Tavoulareas) that Comnas be replaced (Tr. 1069, 1070, 1098, 1186). Warner in turn made the decision that, for justifiable reasons, Comnas should be removed from Atlas (Tr. 1070, 1326, 1531-34). The other Samarco partners were also dissatisfied with Comnas. *See supra* at 7-8. Moreover, Warner suggested that Tavoulareas meet with Comnas in London to express Mobil's disappointment in Comnas' performance (Tr. 1070, 1333). In London, Harmon Hoffmann and Walter MacDonald negotiated in the morning with Comnas over the terms for his departure from Atlas. Tavoulareas met with Comnas, Hoffmann, and MacDonald at lunch, but the morning's negotiations were not discussed (Tr. 3349). After reading the written agreement drafted by Hoffmann and MacDonald detailing the terms for Comnas' departure, Tavoulareas deferred the decision on the proposed contract "to top management in New York" (Tr. 1339). These facts establish that Tavoulareas made no decisions concerning Comnas' departure from Atlas.[36] Moreover,

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[36] Tyler's article stated that "[t]he elder Tavoulareas played a personal role in forcing the resignation . . . of Comnas" (Paragraph 24), implying that William had caused Peter's advancement in Atlas by forcing Comnas' resignation. However, it is undisputed that Comnas' removal was based on his

to the extent Tavoulareas was "involved in persuading the Alirezas to retain Atlas as Samarco's independent management firm upon Comnas' departure," Maj. Op. at 46, he was "involved" only to keep management of Samarco's ships independent—a result desired by high-ranking officials at Mobil (Tr. 3296, 3300-01).

Thus, the majority offers no evidence establishing the truth of the charge that "Tavoulareas made it possible for Peter to become a partner in Atlas and then helped to ensure that the business would prosper because Peter was his son." What the majority does submit is evidence that Mobil officials decided that it was in the best interests of Mobil that an independent company should manage Samarco's ships and that the best candidate for the job was a company headed by George Comnas. That Peter Tavoulareas might incidentally benefit from this arrangement because of his later association with Comnas was understood by Mobil officials but considered acceptable in light of William Tavoulareas' removal from decisionmaking regarding Atlas and Samarco. The majority torturously converts this evidence establishing that Mobil wanted Atlas to independently manage Samarco's ships into evidence proving William Tavoulareas "set up" Peter.

The majority has not explained why, in the face of overwhelming evidence that Mobil officials decided to have Atlas manage Samarco's ships, Tavoulareas' "personal involvement in the establishment and operation of Atlas," Maj. Op. at 46, should be interpreted to be for

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unsatisfactory performance and was therefore justified. Thus, there is no ground for the article to suggest that William caused Peter's rise in Atlas. Peter's increased ownership resulted from Comnas' justifiable removal and Hoffmann's later decisions to refuse the offered equity interest in Atlas and to return to Mobil after he had determined that Peter and Emmanuel were qualified to manage Atlas.

"Peter's manifest benefit." *Id.* Given the evidence that William Tavoulareas complied with Mobil's conflict of interest rules by removing himself from decisionmaking regarding Atlas and Samarco; that Mobil officials, independently of Tavoulareas, decided for good business reasons that Atlas should manage Samarco's ships, and continued to do so after Comnas departed; and that the benefit redounding to Peter from this arrangement was incidental and not engineered by William, a reasonable jury could find that the "set up" charge was false.[37] For the majority to conclude otherwise, while at the same time baldly asserting that it "considered all the evidence in the light most favorable to Tavoulareas," Maj. Op. at 23,[38] is baffling and unsupported. The majority simply fails to meet the standard for judgment n.o.v., for it has not persuasively demonstrated that "the evidence [for the "set up" charge], together with all inferences that can reasonably be drawn therefrom[,] is so one-sided [in favor of the Post] that reasonable men could not disagree on the verdict." *Vander Zee v. Karabatsos*, 589 F.2d 723, 726 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 962 (1979).

Because the evidence in the record demonstrates that a jury could reasonably have concluded that the *Post* article was both defamatory and false,[39] the *Post*'s liabil-

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[37] The majority claims that the abundant evidence the dissent cites for the proposition that a reasonable jury could find the "set up" charge to be false is in reality only evidence that Tavoulareas complied with Mobil's conflict of interest guidelines. Maj. Op. at 46 n.33. To the contrary, the cited evidence also indicates that the benefit accruing to Peter from the Mobil-Samarco-Atlas arrangement simply was not contrived by William. In sum, the evidence is far from "undisputed" that William "set up" Peter.

[38] *See also* Maj. Op. at 27.

[39] To be sure, portions of the non-defamatory statements in the *Post*'s article were true. "[T]he defamer may be the more

ity under present law depends upon whether the article was published with reckless disregard for its truth or falsity.

IV. Reckless Disregard for the Truth—Actual Malice

As noted in part II above, the duty of an appellate court in reviewing a defamation verdict is to decide, after viewing the evidence and all legitimate inferences in the light most favorable to the verdict, whether the ultimate constitutional conclusion was sufficiently proven at trial—*i.e.*, in this case whether the evidence adduced at trial amounted to "clear and convincing" proof of reckless disregard for the truth. Although the *Post* argues that evidence may not be cumulated to establish a defendant's reckless disregard for truth or falsity, *The Washington Post* Petition for Rehearing and Suggestion for Rehearing *En Banc* at 7, the majority admits that a defendant's reckless disregard for the truth can be proven both through direct evidence and through the cumulation of circumstantial evidence. Maj. Op. at 51. *See Herbert v. Lando*, 441 U.S. 153, 160 (1979); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 55 (1971); *Bose Corp. v. Consumers Union of United States*, 692 F.2d 189, 196 (1st Cir. 1982), *aff'd* 466 U.S. 485 (1984); *Goldwater v. Ginzburg*, 414 F.2d 324, 342 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970); *see also Tavoulareas v. Piro*, 763 F.2d 1472, 1477-78 (D.C. Cir. 1985) (panel opinion denying rehearing). What follows is a discus-

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successful when he baits the hook with truth." Afro-American Publishing Co. v. Jaffee, 366 F.2d 649, 655 (D.C. Cir. 1966) (*en banc*). But a jury could readily have found false the defamatory implications of the article as a whole, as well as the specific allegations that "Tavoulareas set up his son," "Tavoulareas personally urged that his son be included as an equity partner in Atlas" and "Tavoulareas dispatched . . . Hoffmann to London to help run Atlas."

sion of the evidence of reckless disregard for the truth that was developed at trial, along with the reasonable inferences that could be drawn from it. Based thereon, it is submitted that the evidence adduced at trial constitutes clear and convincing proof that the *Post* article was published with reckless disregard of its truth or falsity, and that the jury's verdict should be reinstated.

A. *The Christine Peterson Memorandum and Tyler's Response*

Christine Peterson's memorandum to her superiors at the *Post* stated that Tyler's article was "impossible to believe." *See supra* at 29. At trial, during which Peterson was still in the *Post*'s employ, Peterson testified that in using the phrase "impossible to believe," she really did not mean what she said, and instead meant that "the focus of the story should have been the formation of Samarco in anticipation of preference shipping" (RE 1837).[40] Tavoulareas contends, on the other hand, that the memorandum is to be given its ordinary meaning and that the jury was entitled to find "that an editor of the *Post* charged with the final review of the story before publication had indeed found . . . the story's theme 'impossible to believe' " and that Peterson's memorandum " 'brought home' the requisite doubt" to those *Post* officials responsible for the article's publication. Appellant's Brief at 35. Peterson's memorandum ultimately reached Milius, Bill Greider, who is another *Post* editor, and Tyler. Tyler's memorandum in response, *see supra* at 32-33, acknowledged that "a good editor might say that part of *our case against Tavoulareas seems*

[40] This attempted qualification does not withstand analysis. Tyler wrote in response to Peterson's memorandum that "a good editor might say that part of *our case against Tavoulareas* seems tenuous" (RE 2489) (emphasis added). Tyler thus recognized that Peterson's memorandum interpreted the article to accuse William with organizing the Mobil-Samarco-Atlas "scheme for the sake of his son's business career" and did not merely suggest a change in the "focus of the story."

tenuous" (RE 2489) (emphasis added), yet no substantive changes were made to the article.

In considering all this evidence, our duty as an appellate court reviewing a jury's verdict is to view the legitimate inferences from the evidence in the light most favorable to the verdict. We are "*required* to draw all inferences favorable to the [verdict]," *Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225, 1234 (D.C. Cir. 1984) (emphasis in original). The inferences to be credited are not a matter for our judgment except to assure that they are legitimate; only the ultimate constitutional issue may be independently assessed. Thus, as to the Peterson memorandum we are required to assume: (1) The jury considered Peterson's attempt to alter the obvious interpretation of her memorandum to be influenced by self-interest in her position at the *Post* and understood the memorandum to mean (what it said) that in her opinion the story was "impossible to believe," and (2) the reasonable effect of Peterson's communication of these doubts to those at the *Post* responsible for the publication was to raise in their minds subjective doubts as to the accuracy of the story. Indeed, the Peterson memorandum suggests that the central theme of the story is *inherently improbable*, and, as the Supreme Court stated in *St. Amant v. Thompson*, a jury may find actual malice where "the publisher's allegations are so *inherently improbable* that only a reckless man would have put them in circulation." 390 U.S. 727, 732 (1968) (emphasis added). Ultimately, it is for the appellate court to independently decide whether the legitimate inferences from all the evidence constitute clear and convincing proof of recklessness.

The *en banc* majority rejects the Peterson memorandum as evidence of actual malice, claiming that the plaintiffs did not connect Peterson's "impossible to believe" language to a false defamatory statement in the

article.[41] The majority reads the memorandum as capable of either of two interpretations—that Peterson "found the story impossible to believe because the story states or suggests that Tavoulareas' primary motivation in establishing the entire Mobil-Samarco-Atlas arrangement was to benefit his son" or that Peterson could not believe "that Tavoulareas set up Peter in Atlas." Maj. Op. at 62-63. Having held that the article cannot bear the interpretation that Tavoulareas arranged the Mobil-Samarco-Atlas arrangement for Peter's benefit and having found the "set up" allegation to be true, the majority concludes that the Peterson memorandum provides no evidence of actual malice. Because it is submitted that the article can be read to falsely charge William Tavoulareas with using his office as president of Mobil to engineer the Mobil-Samarco-Atlas scheme for Peter's benefit, *see supra* at 24-36, and because in my opinion there is substantial evidence proving false even the allegation (as narrowly read by the majority) that Tavoulareas "set up" Peter, *see supra* at 36-43, I would hold that the "serious doubts" raised by the Peterson memorandum are connected to false and defamatory meanings present in the article.

Even if the majority is correct in rejecting the article's broader defamatory meaning as a matter of law and in holding the "set up" allegation true, its dismissal of the Peterson memorandum remains faulty. Although admitting the memorandum can be read to express Peterson's "disbelief that Tavoulareas 'set up' Peter," the majority makes no mention of the effect of the Peterson memorandum on the false defamatory statement that

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[41] Without citation to any precedent, the majority asserts that "defamation plaintiffs cannot show actual malice in the abstract; they must demonstrate actual malice *in conjunction* with a false defamatory statement." Maj. Op. at 62 (emphasis in original). The majority's treatment of the evidence of actual malice demonstrates once again the failure of the majority to address the article as a whole.

William Tavoulareas "personally urged" Comnas to make Peter a partner in Atlas. Certainly, if Peterson doubted the truth of the story's charge that Tavoulareas "set up" Peter, her doubts would encompass the "personally urged" allegation as well, since, as the majority recognizes, "the personally urged allegation goes beyond the general charge that Tavoulareas 'set up' his son and suggests that Tavoulareas actively pressured Comnas to hire Peter rather than merely rewarded Comnas for doing Peter a favor." Maj. Op. at 50.[42]

Thus, contrary to the majority's suggestions otherwise, there is no basis to disregard the "serious doubts" raised by the Peterson memorandum. The memorandum and Patrick Tyler's response admitting that "a good editor might say that part of our case against Tavolareas seems tenuous" therefore provide evidence that the *Post*

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[42] The majority insists that because the *Post* included Tavoulareas' denial of the "personally urged" charge in the article, the statement could not have been published with actual malice. Maj. Op. at 30 n.17 & 63 n.44. It is noteworthy that in Mobil's written response to Tyler's questions, Tavoulareas did not only deny that he had, in April 1974, personally urged Comnas to take in Peter, but also affirmatively asserted that it was Comnas who had said he wanted Peter to join him in Atlas (RE 2344). Tyler's failure to check with Comnas about the truth of Tavoulareas' statement (which runs counter to Comnas' claim that William originated the idea of Peter joining Comnas' new venture) indicates a reckless disregard for truth or falsity.

The fact that Tyler published Tavoulareas' denial of the "personally urged" allegation does not in any way vitiate the value of the evidence that Tyler published the charge with reckless disregard for truth or falsity. If the majority's logic were followed, a newspaper that reported a man committed murder, knowing the report to be false or having serious doubts as to its truth, would be absolved from liability if the newspaper had also included the man's denial of the charge. Surely the First Amendment does not prevent a finding of actual malice whenever a defendant publishes false defamatory statements accompanied by denials.

acted with reckless disregard for truth or falsity in publishing the article.

B. *The Reliability of the Sources*

The Supreme Court has held that "recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *St. Amant*, 390 U.S. at 732. Considerable evidence was introduced at trial tending to show that Tyler had reason to doubt the veracity of the two principal sources he relied on for the article—Comnas and Piro.

1. *Comnas*

Comnas, according to the *Post*, was the *principal source* for the story, as the chief source for both the "set up" allegation and the "personally urged" charge and other details recounted in the story. Conflicting evidence was introduced at trial regarding Comnas' reliability. On one hand, Piro testified he told Tyler that "George Comnas had been caught in some fraud involving Atlas, that he was forced to withdraw [from Atlas] and that if Comnas ever gave Peter and Atlas any trouble Comnas would be reported to the tax authorities" (RE 1857-58). *See also supra* at 7 n.9. On the other hand, the *Post* contended that Comnas was reliable due to (1) his "Who's Who" listing, indicating that he was an experienced shipping executive; (2) William's SEC testimony, which "never hinted at any improprieties," and stated "that Mobil 'had every confidence in the world' in Comnas;" and (3) some independent corroboration of much of what Comnas told the *Post*. Again, the evidence suggests that the *Post* knew of facts suggesting that Comnas was an unreliable source. The *Post*'s failure to call him as a witness or to use his deposition, especially after listing him as a witness for trial, points to the glaring weakness of the *Post*'s defense.[43]

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[43] In view of the *Post*'s listing of Comnas as a witness (RE 2294) and then neither calling him nor introducing his

The majority opinion also places entirely too much emphasis on the fact that Tyler corroborated *some* of the

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deposition, the jury was left to evaluate the *Post*'s defense without the testimony of the *Post*'s principal source for the story. These circumstances must be taken into consideration in evaluating the credibility and inference determinations that the jury could legitimately draw from all the evidence.

The fact that the *Post* neither introduced Comnas' deposition nor called Comnas to testify is worthy of note even if reliance on a "missing witness" presumption would be inappropriate. That decision by the *Post* left its defense and the jury without any direct testimony from the *principal source* for the *Post* story. Comnas was the *principal source* for the story, and in place of Comnas' direct testimony, or his deposition, the jury was left to consider primarily the repetition of his statements by Tyler whose credibility was weakened by obvious self interest, his questionable recording of conversations and other factors. *See supra* at 9-12, *infra* at 56-57.

Moreover, it is far from clear that application of a missing witness instruction with respect to Comnas' deposition testimony would be inappropriate in these circumstances. As we pointed out in United States v. Young, 463 F.2d 934, 942-43 (D.C. Cir. 1972), the propriety of applying a missing witness presumption often turns on the missing witness' "relationship to the parties." In this case Comnas must be considered as a witness favorable to the *Post* defendants. They relied upon him in the article. They listed him as one of their trial witnesses. At trial they relied upon his statements as repeated or allegedly recorded *by others*. Comnas' statements were the very core of the *Post*'s defense; that defense was tremendously weakened by its unexplained reliance on second-hand evidence which resulted from the failure of the *Post* to call Comnas after listing him, or to use any part of his deposition. One must search far to find a weaker defense in a libel case. The true rule applicable to the situation presented here was set forth by Learned Hand, J., in United States v. Cotter, 60 F.2d 689, 692 (2d Cir.), *cert. denied*, 287 U.S. 666 (1932) and takes cognizance of the "relationship of the parties":

> When both sides fail to call a witness who knows something of the facts, their conduct, like anything else they do, is a circumstance which a jury may use. If both can call him and he is impartial, ordinarily it will have little weight; *if it appear that he would naturally side with one*

information supplied by Comnas. Maj. Op. at 55.[44] Citing *St. Amant* for the proposition that verification of part of a source's information is indicative of a lack of actual malice, the majority concludes that the evidence in the record fails to show that Tyler acted recklessly in relying on Comnas. But the majority's reliance on *St. Amant* is misplaced. A distinguishing feature of *St. Amant* is that "there was no evidence in the record of [the source's] reputation for veracity." 390 U.S. at 733. But in the instant case, the defendants *knew* that Comnas was not trustworthy—Piro had told Tyler of previous fraudulent scandals in which Comnas was involved and Tyler knew that one of the reasons Comnas was dismissed from Atlas was because of fraudulent dealing.

2. *Piro*

The evidence developed at trial regarding the *Post*'s reliance on Piro demonstrated that the *Post* was aware that Piro was engaged in a less-than-amicable divorce with William's daughter and that Piro was admittedly ignorant of the companies and the complicated business relationships involved in the Mobil-Samarco-Atlas arrangement (Tr. 2899, 2901, 2908, 2910). The latter fact alone would have been sufficient grounds for a reasonable reporter to question Piro's conclusions. Nevertheless, the

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> *party*, it is reasonable to expect that he does not use him for good reason; and that is fair argument for the other.

(Emphasis added). The jury was perfectly free to come to a similar conclusion and no court should be required to rescue a defendant from such folly.

[44] The majority stresses that Tyler received independent confirmation of Comnas' charge from John Kousi. It is noteworthy that Tyler felt a greater need to obtain this "confirmation" *after* publication of the article than before. Tyler spoke with Kousi two or three times before the story appeared in print; ten to fifteen times afterwards (Tr. 3194). A more extensive interrogation of Kousi and others might have brought Tyler closer to the truth and given him a better understanding of the whole Mobil-Samarco-Atlas venture.

Post, while denying it now, did rely on Piro for several parts of its story. Piro was solely responsible for two of the statements in the article: (1) that William "[gave] Peter a little nudge to get him along" in the shipping business,[45] and (2) that William "[personally] dispatched [Hoffmann] to help run Atlas."

At trial, the defendants testified that they really did not rely on Piro in writing the article, even though he was cited and quoted several times. Under the circumstances, the jury was entitled to disbelieve this testimony, especially in light of the fact that Piro was the *sole* source for the two statements above. In viewing this evidence in the light most favorable to the verdict, one can only conclude that the jury found that the *Post*, in relying on Piro, relied on a source admittedly unknowledgeable in the details of the business transactions for which he was quoted.

C. *Defendants' State of Mind For Knowing or Reckless Falsehood*

Because it provides a motive for knowing or reckless falsehood, evidence that a newspaper or a reporter followed a sensationalistic policy, or possessed ill-will toward the plaintiff, is evidence of actual malice. *See, e.g., Curtis Publishing Co. v. Butts*, 388 U.S. 130, 169 (1967) (Warren, C.J., concurring) (defendant had adopted a "program of 'sophisticated muckraking,' designed to 'provoke people, make them mad'") (footnote omitted); *Goldwater v. Ginzburg*, 414 F.2d 324, 342 (2d Cir. 1969) ("evidence of . . . motive and intent" may help establish actual malice), *cert. denied*, 396 U.S. 1049 (1970); *Bose Corp. v. Consumers Union of United States*, 692 F.2d 189, 196 (1st Cir. 1982) (same), *aff'd*, 466 U.S. 485

[45] There is no basis in the record for concluding that this statement referred (as the article applied it) to William's support for Peter's joining Atlas and not to William's support for Peter's originally entering the shipping business with Lemos & Co.

(1984); *Cochran v. Indianapolis Newspapers*, 175 Ind. App. 548, 560, 372 N.E.2d 1211, 1220 (1978) (desire to "get" plaintiff is "relevant and admissible as *evidence* in the determination of whether defendant possessed a state of mind highly conducive to reckless disregard of falsity") (emphasis in original); R. Sack, *supra*, at 214 n.168 ("Although common law actual malice—spite or ill-will—is not equivalent to or sufficient to prove constitutional 'actual malice,' evidence as to the former is admissible to prove the latter."). As the Supreme Court of West Virginia explained:

> [W]hen [*Associated Press v. Walker*, 388 U.S. 130 (1967)] and *Curtis* are read together, they still stand for the proposition that *personal motives on the part of a newspaper*, or participation by a newspaper in a plan or scheme to injure, *is evidence of recklessness and willful disregard for truth* which may be considered along with other evidence on the question of actual malice.

Sprouse v. Clay Communication, 158 W.Va. 427, 211 S.E.2d 674, 688, *cert. denied*, 423 U.S. 882 (1975) (emphasis added). *Cf.* C. Mollenhoff, *Investigative Reporting* 358 (Macmillan Pub. Co. 1981).

In this case, there is abundant evidence in the record demonstrating defendants' state of mind for knowing or reckless falsehood.

1. *Tyler's Desire to "Knock Off" Mobil and "Build a Case" against Tavoulareas*

Immediately after he first heard Piro's story, Tyler seemingly accepted its truth and remarked to Golden: "It's not every day you knock off one of the seven sisters." (RE 789). Taking the evidence in the light most favorable to the plaintiff, this demonstrates an ambition at the very outset to "bring down" Mobil which could cause—and may properly be considered evidence tending to prove—a reckless disregard of the truth. The same

antagonistic mind-set is reflected in Tyler's reference, in his memorandum responding to Peterson's criticism, to "our case against Tavoulareas" (RE 2489).

The majority is playing with words when it says that these statements merely reveal that Tyler had adopted "an adversarial stance," which is not indicative of reckless disregard of the truth. Taking an adversarial stance means treating someone like an opponent rather than impartially. While this may not *conclusively* demonstrate reckless disregard of the truth (any single piece of evidence rarely does), it unquestionably points in that direction. *See Cochran v. Indianapolis Newspapers*, 175 Ind. App. 548, 560, 372 N.E.2d 1211, 1220 (1978). An opponent is more likely to distort the facts than an impartial or objective reporter. I am surprised by the majority's refusal to acknowledge the probative character of this evidence, since even the *Post* did not contest its relevance at trial.

2. *Tyler's Willingness to Resort to Unlawful Means*

Tyler's desire to "bring down" Mobil and "make a case" against Tavoulareas is particularly strong evidence of reckless disregard for truth or falsity when it is combined with evidence of Tyler's willingness to use unethical, and indeed unlawful, means to achieve his ends. Taking the evidence in the light most favorable to plaintiffs, we must assume that Tyler inquired of Piro, with serious intent, whether Piro "knew of a family member who would rifle [Tavoulareas'] safe and [x]erox documents" (Tr. 179). Tyler's willingness to resort to such felonious methods is consistent with a state of mind that would act recklessly in stretching the facts to "make a case."

3. *The Post's Pressure On Its Reporters*

One of the three issues the *en banc* court requested the parties to brief was "[w]hether managerial pressure

upon reporters to produce sensationalistic stories is a factor that may be considered in the determination of actual malice?" The majority, apparently unconcerned by the fact that counsel for the *Post* conceded that evidence of such pressure was "relevant," *see* Transcript of Oral Argument at 28-29 (October 3, 1985), concludes to the contrary. The majority does not dispute that Woodward instructed his reporters to produce "holy shit" stories—presumably stories so startling that they cause the reader to exclaim in this fashion: The majority attempts to discredit this evidence by replying that it does not indicate that the *Post* was unconcerned with the truth of its stories. Quite so, but totally irrelevant. The issue is not whether the *Post* subjectively desired false stories but whether extra-heavy pressure to produce sensationalistic stories could motivate reporters to stretch the truth. Of course it could, as any reasonable person, including the *Post* itself,[46] would agree. As the court reasoned in *Curtis Publishing Co. v. Butts*:

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[46] The *Post* reached this precise conclusion in its published self-criticism following the so-called "Jimmy's World" hoax, a Pulitzer Prize winning story published by the *Post* on September 28, 1980 concerning an alleged 8-year-old heroin addict. The story proved to be a *complete fabrication.* Following the public exposure of the story as false, the *Post* conducted an extensive internal investigation and, *inter alia,* published its finding regarding the effect of the pressure it placed upon its reporters. A part of that finding was as follows:

> The troubling question is whether pressure on the staff distorts the news published in the paper . . . .
>
> Lewis Simons of Metro says: "Pressures are so great to produce, to go beyond excellence to the 'holy s—' story. Everyone knows that's what the editors want: The pressure is to get the incredible story, the extraordinary story.
>
> "People want to succeed. They bust their ass to succeed here . . . . It can result in overselling a story . . . ."
>
> [S]ome reporters said they felt strongly that the "system" at the Post has editors making demands on reporters

> The Saturday Evening Post was anxious to change its image by instituting a policy of "sophisticated muckraking," and the *pressure* to produce a successful expose might have induced a stretching of standards. In short, the evidence is ample to support a finding of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.

388 U.S. at 158 (emphasis added). *See also id.* at 162, 169 (Warren, C.J. concurring).[47]

As to the effect of the *Post*'s pressure, that was for the jury to weigh. It is of course not inevitable that extreme pressure for sensationalistic stories will lead to distortion

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> that cannot be met. That reporters are made to feel they are failures when they cannot meet those demands. . . .
>
> Editors are somewhat infected too.

The Washington Post, Apr. 19, 1981, at A15.

[47] The nature of the libel charged in the *Butts* and *Tavoulareas* stories have many similarities. The media defendants in both cases misrepresented the intent with which those defamed acted. In *Butts* all facts were construed to support a conclusion that the *reason* Butts, the Athletic Director at Georgia, and Bear Bryant, football coach at Alabama, were trading information was due to their "conspiring" (intent) "to fix" the upcoming Georgia-Alabama football game; in the *Post* article the alleged *reason* that Tavoulareas *"set up"* the Mobil-Samarco-Atlas venture (or just the "Atlas venture" as the majority would limit the charge) was because he *intended* to benefit Peter. In *Butts*, after denials by the plaintiff, it was thus for the jury to determine whether he had proved that he did not *intend* "to fix" the game as charged in the article. And here, after Tavoulareas' denials, it was for the jury to determine whether he had "set up" and implemented the Mobil-Samarco-Atlas enterprise (or just the Atlas venture) with *intent* that violated his fiduciary duty to Mobil. In both cases, the basic facts—*i.e.*, the existence of a phone conversation in *Butts* and the entry by Mobil into the Samarco-Atlas venture—were true. The false defamation existed in the articles' charges of corrupt intent.

of the truth. And I cannot imagine that such pressure alone, without more, would support a finding of actual malice.[48] But pressure of a certain degree, as in *Butts*, can assuredly be probative—and whether the pressure existed, whether it was excessive, and whether it affected the reporting or editorial judgment, are, within the bounds of what the evidence will sustain, questions for the jury. Faced with a choice between conflicting reasonable inferences that can be drawn from the evidence, we as a reviewing court are required to draw the legitimate inferences favorable to the jury's verdict and then independently review the constitutional sufficiency of such facts. On that basis, it can only be concluded that the "holy shit" exhortation is some evidence of the reckless publication of the defamatory falsehoods against Tavoulareas.

D. *Erroneous Recording of Interviewees' Statements*

The record reveals that Tyler misstated in his notes and in the article responses by individuals whom he interviewed. For example, Tyler called Everett Checket, a Mobil vice-president, to inquire whether William Tavoulareas told Checket that he had sent Hoffmann to Atlas. Tyler wrote in his notes that Checket said the conversation sounded "somewhat familiar" (RE 2493). Checket testified, however, that he did *not* tell Tyler that the conversation sounded familiar. Indeed, Checket denied that the conversation ever occurred (Tr. 1844-48). The jury could reasonably have concluded from this evidence that Tyler either carelessly or intentionally misstated the contents of his interview with Checket.

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[48] Contrary to the majority's characterization, I do not argue that a question of actual malice arises "whenever a libel plaintiff introduces evidence that the newspaper vigorously pursues high-impact stories of alleged wrongdoing." Maj. Op. at 68. Rather, it is submitted that evidence of extreme pressure for sensationalistic stories may be probative of the issue whether a reporter was thereby motivated to deal recklessly with the facts.

There is also evidence that Tyler failed to record accurately the statements of Peter Tavoulareas. Peter's notes of his conversation with Tyler show that Peter stated "[*a*]*side from our management* we have nothing to do with the Arabs or with Mobil" (RE 2550) (emphasis added). Tyler wrote in his notes "nothing to do with Samarco, nothing to do with Mobil" (RE 2518) and quoted Peter in the article as stating "Atlas has nothing to do with Mobil, it has nothing to do with Samarco and it has nothing to do with the Saudis" (Paragraph 33).[49] Again, a reasonable jury could determine from this that Tyler either accidently or deliberately misconstrued Peter's statements.

Thus, the record supports a conclusion that, at best, Tyler was negligent in erroneously recording the contents of interviews. Although evidence of negligence does not alone support a finding of actual malice, such evidence can be probative of a reckless disregard for truth or falsity. *Bose Corp. v. Consumers Union*, 692 F.2d 189, 196 (1st Cir. 1982), *aff'd* 466 U.S. 485 (1984); *Goldwater v. Ginzburg*, 414 F.2d 324, 343 (2d Cir. 1969) ("[*New York Times v. Sullivan*] does not hold that evidence of negligence is inadmissible"), *cert. denied*, 396 U.S. 1049 (1970).

E. *Resolution of Inferences Adverse to the Plaintiff*

It is well settled that in a situation where the facts are ambiguous, the mere selection of the most damaging inference by the reporter does not, *alone*, indicate reckless disregard for the truth. In *Time, Inc. v. Pape*, 401 U.S. 279 (1971), the Court held that *Time* magazine's resolution of one such ambiguity in the light most damaging to the plaintiff did not amount to actual malice:

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[49] The difference between Peter's and Tyler's versions is significant because the latter implies that Peter denied the management connection between Atlas and Samarco.

> Time's omission of the word "alleged" amounted to the adoption of one of a number of possible rational interpretations of a document that bristled with ambiguities. The deliberate choice of such an interpretation, though arguably reflecting a misconception, was not enough to create a jury issue of "malice" under *New York Times*.

Id. at 290. This holding makes obvious sense; since the focus of the malice inquiry is subjective, not objective, the mere selection of a single damaging inference is ordinarily not sufficient to prove actual malice.

The defendants argue from *Pape* that the *consistent* selection of the inferences most damaging to the Tavoulareases would be irrelevant to the issue of actual malice. Appellee's Brief at 62. This assertion, however, is entirely inconsistent with the subjective nature of the malice inquiry and goes far beyond the holding in *Pape*. A defendant's single, or even occasional, selection of the most disparaging inference from among a number of possibilities is not evidence that it acted with malice. But a defendant's *consistent* rejection of favorable inferences in favor of the most damaging inferences—inferences that in fact are false—does suggest a determination to incorrectly describe the plaintiff and place him in the most damaging light, and thus can demonstrate a reckless disregard for the truth.[50]

In this article the *Post* did not simply resolve a single ambiguity adversely to Tavoulareas. In building its "case against Tavoulareas," it resolved practically all ambiguities against him, *consistently* accepting the most

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[50] As Judge Gasch correctly charged the jury:

> In the course of your deliberations on the actual malice question, you [may consider] whether the *Post* defendants chose to resolve uncertainty in contradictions or ambiguities in their information concerning the plaintiff in a way most harmful to the plaintiff.

(Tr. 4555).

damaging statements from obviously biased and impeachable sources. It is absurd to suggest, as the majority does, Maj. Op. at 69, that this is not a basis for an inference of reckless disregard for the truth.

F. *Suppression of Information Favorable to the Plaintiff*

Evidence demonstrating the suppression of information favorable to the plaintiffs is closely related to evidence of the adoption of inferences adverse to the plaintiffs. Clearly, a writer who knowingly and consistently suppresses information favorable to the plaintiffs is more likely to have entertained subjective doubts as to the accuracy of his story. *See, e.g., Time, Inc. v. Ragano*, 427 F.2d 219, 221 (5th Cir. 1970) (failure to include fact that plaintiff was attorney when implication of article would lead people to believe he was organized crime figure); *Wasserman v. Time, Inc.*, 424 F.2d 920, 922 (D.C. Cir.) (same), *cert. denied*, 398 U.S. 940 (1970); *Montandon v. Triangle Publications, Inc.*, 45 Cal. App. 3d 938, 943-44, 120 Cal. Rptr. 186, 189 (omission of key fact in otherwise truthful statement held evidence of reckless disregard of truth), *cert. denied*, 423 U.S. 893 (1975); *Indianapolis Newspapers v. Fields*, 254 Ind. 219, 259 N.E.2d 651, 662 (time discrepancy known to reporter and witnesses' repudiation of key fact mentioned only once during series of articles held evidence of actual malice), *cert. denied*, 400 U.S. 930 (1970).

Evidence abounds in this record showing that the *Post* suppressed information favorable to the Tavoulareases. The district court examined several of these pieces of information which were known to Tyler but which were not included in the story:

> 1. Lewis Lapham, an *outside* director of Mobil, told Tyler that the Mobil board had "consistently reviewed the relationship between Mobil and Atlas and . . . was *completely satisfied with all aspects of it.*" 567 F.Supp. at 658 (emphasis added).

2. Lapham told Tyler "that he did not believe that plaintiff [William Tavoulareas] played a personal role in Atlas and that at key board meetings plaintiff would leave the room to facilitate the opportunity for more open discussion of the subject." *Id.*

3. There was considerable evidence that "Mobil profited significantly from [the Samarco-Atlas] relationship and that Atlas was not merely a fly-by-night organization set up solely for Peter's benefit." *Id.* at 659. Both John Kousi, a Samarco director, and Comnas, the defendants' main source for the *Post* article, told Tyler that Atlas could run Mobil's ships more cheaply than the oil company could.

Early drafts of the story did contain some of this information, but it was eliminated from the final version during the editing process. One early draft, for example, stated:

> During these briefings [on Atlas-Samarco dealings] by Warner, Lapham said, Tavoulareas would leave the room. Lapham said he still believes Warner's account of events and rejects any suggestion that Tavoulareas took a personal role in Atlas.
>
> "There's nothing to any of that," Lapham said. "It was explained to the satisfaction of the board."

(RE 2528). The defendants argue that while Lapham's specific words were cut out, the point he made was not. But proof of the point was placed on weaker grounds. As a substitute for Lapham's specific statement that Tavoulareas went so far as to leave the room during board discussions of Atlas, and his assurance that there was "nothing to [the suggestion that Tavoulareas took a personal role in Atlas]," the defendants point to the following passage from the article:

> Mobil chairman Warner says he assured directors in board meetings that Tavoulareas "does not participate in any decisions" relating to Mobil's business with Atlas.

Thus, the article substituted an "assurance" by Warner (an inside director) for a more concrete and expansive statement by Lapham (an *outside* director)—a substitution that considerably weakens the point, particularly when an underlying theme of the *Post* article was that Tavoulareas' mere position as president constituted *internal* corporate influence that implicitly affected the Atlas operation.

Next, in place of Lapham's direct statement that the Mobil board "was completely satisfied" with the Samarco-Atlas relationship, the article stated:

> The Mobil board of directors was told from the outset about the Atlas arrangement but was assured that company president Tavoulareas was not involved in his son's venture in any way.

Thus, instead of a direct assertion of an unimpeached outside director that the Board had investigated and was "completely satisfied," the article states merely that the directors were simply "assured" by an unidentified "someone" that there was no impropriety. This grossly understates the force of the information provided by Lapham and operates to the disadvantage of Tavoulareas. Lapham's statements that the Board had "consistently reviewed" the Atlas arrangements and that he was convinced that William Tavoulareas had played no personal role in Atlas were simply ignored and never printed.

The *Post* article also disregarded other evidence in its possession that tended to describe the arrangement in a light more favorable to the plaintiffs and to Mobil. In evaluating the economic impact of the arrangement, for example, the *Post* ignored the information supplied by Kousi (whose favorable comments were deleted during the editing process) and even the comment furnished by its principal source, Comnas, that the Atlas arrangement saved Mobil money (RE 2501). The defendants alluded instead to "millions of dollars in business" and "exclusive, no-bid contracts," which strongly implied that

Mobil was being greatly exploited and gouged by an irregular arrangement in which Tavoulareas had "set up" his son. Similarly, the story failed to include or refer to two internal Mobil memoranda prepared at the time the Samarco-Atlas arrangement was created and which Tyler had in his possession. One memorandum instructed Mobil personnel that all business dealings with Atlas were to be conducted at "arm's length;" the other, written by William Tavoulareas, specifically directed Vice-President Wolfe to bypass Tavoulareas and report directly to Chairman Warner on any Samarco-Atlas matters.

From this evidence, two reasonable conflicting factual inferences could be drawn—*i.e.*, that Mobil was being gouged or that the Samarco-Atlas venture was financially beneficial to Mobil. But we are required to draw the legitimate inferences most favorable to the verdict. This evidence of the suppression of information favorable to the plaintiffs was directly probative of Tyler's reckless disregard for the truth or falsity of the article.

G. *Conclusion*

The evidence in the record viewed in the light most favorable to the verdict establishes the following:

- Subjective doubts regarding the article's truth were entertained by one person responsible for the publication (Peterson) and were brought by her to the attention of others responsible for the publication, who proceeded in disregard of her cautionary memorandum.
- The article relied on patently unreliable sources for its central allegations.
- Tyler wanted to "bring down" Mobil and "make a case" against Tavoulareas.
- Tyler was willing to resort to unethical, and indeed unlawful, means for that purpose.
- The reporting and editorial judgments made in connection with the article were affected by heavy managerial pressure to produce sensationalistic stories.

- Tyler either negligently or deliberately misstated remarks made by interviewees.
- The article regularly drew inferences adverse to the Tavoulareases where favorable inferences were equally available and justifiable.
- The article suppressed important information favorable to the Tavoulareases.

In my view, this evidence establishes clearly and convincingly that the false statements and implications in the subject article were put forth with reckless disregard for their truth or falsity. The fact that Tyler faced no deadline pressure, and thus had plenty of time to reflect upon the story's implausibility and conduct further investigation, buttresses this conclusion.

The affirmative indications of good faith introduced by the defendants (which, under j.n.o.v. standards must be regarded in the *least* favorable light) are insubstantial and do not alter the conclusion. Primary among these is the fact that Tyler devoted a considerable amount of research to the story, working on it over a thirty-day period. Extensive efforts to get at the truth can be persuasive of good faith in some circumstances, but not when, as discussed above, the products of those efforts favorable to the plaintiff are systematically disregarded or excluded from the story, and adverse inferences systematically drawn. When such distortion of research appears, protracted investigation evidences only a dogged and thorough attempt to "get" the subject.

The systematic suppression of favorable evidence likewise reduces to insignificance the potential probative effect of the defendants' attempts to interview William Tavoulareas. The defendants were already aware that Tavoulareas had denied the substance of the charges, and there is no reason to believe that his exculpating statements with regard to any of the details would have been treated any more sympathetically than the exculpating statements Tyler received from more impartial sources

such as Lapham—which, as we have seen above, were suppressed or altered. The *Post* did at least record Tavoulareas' denial. The proof of malice would have been even more clear and convincing if the *Post* had not done so, but that minimal concession to fairness falls far short of redeeming a pattern of behavior that displays, clearly and convincingly, a reckless disregard for truth or falsity.

Chief Judge Wald asserts that the foregoing analysis does not constitute an independent review of the evidence of actual malice. Concurring Op. at 3-4. To the contrary, the review employed here conforms with recent Supreme Court pronouncements on actual malice, which stress that "[t]he independent review function is not equivalent to a '*de novo*' review of the ultimate judgment itself," *Bose Corp. v. Consumers Union of the United States*, 466 U.S. 485, 514 n.31 (1984) and that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson v. Liberty Lobby*, —— U.S. ——, ——, 54 U.S.L.W. 4755, 4759 (1986). Judge Wald's proposal that the court "independently review inferences that the jury may be presumed to have drawn," Concurring Op. at 2-3, contradicts the Supreme Court's recent reaffirmation in *Anderson* that even when actual malice must be established (with clear and convincing proof), the drawing of legitimate inferences remains the function of the jury. *Id.* Independent review instead necessitates that the court evaluate the sufficiency of the facts in the record and the legitimacy of the inferences necessarily drawn by the jury from those facts in assessing whether the constitutional requirement of clear and convincing evidence of actual malice has been met. In such manner, the reviewing court respects both the right to jury trial under the Seventh Amendment[81] and the protections afforded the press by the First Amendment.

The foregoing independent assessment of "those portions of the record which relate to the actual-malice determination," *Bose*, 466 U.S. at 514 n.31, leads to the conclusion that the facts and the reasonable inferences drawn therefrom constitute clear and convincing proof that *The Washington Post* acted with actual malice when it published the November 30, 1979 article. The jury's verdict should thus stand.

V. Piro

The plaintiffs sued Dr. Piro for slander and its foreseeable republication with respect to, among other things, his statement that William had "set up" Peter as a partner in Atlas. Complaint, *Tavoulareas v. Piro*, Civ. No. 80-2387 (D.D.C. Sept. 19, 1980) (RE 89, 90). The jury returned a verdict in favor of both plaintiffs, but the district court granted judgment n.o.v. in favor of Piro against William (although the court affirmed the jury verdict in favor of Peter). From the analysis set forth above, it is clear that a jury in William's case could reasonably have found that this allegation by Piro was false and defamatory. The question then is whether it was uttered with reckless disregard for its truth or falsity.[52]

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[51] The Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const. Amend. VII.

[52] Tavoulareas does not contest, and this opinion, along with the majority's, *see* Maj. Op. at 70 n.53, assumes without deciding that Piro, although a non-media defendant, is nevertheless protected by the *New York Times v. Sullivan* requirement of proof of actual malice by clear and convincing evidence. This assumption also means that the court must exercise its independent judgment in determining whether the facts support

At trial and in his brief to this court, Piro admitted that he did not comprehend the details of the business arrangements involving Mobil, Samarco and Atlas. *See* Brief for Appellee Piro at 10; Piro's testimony at Tr. 2899-2928. Indeed, he testified that he had "never heard of Samarco" (Tr. 2899). Since knowledge of those details was obviously crucial to the judgment whether William Tavoulareas breached his fiduciary obligation, Piro's acknowledgment of ignorance was tantamount to an admission that in making that charge he acted recklessly. When that is combined with Piro's hostility to the Tavoulareases resulting from his pending divorce, there was clear and convincing proof of Piro's reckless disregard for truth or falsity.

VI. Conclusion

Great national issues are raised by the methods the majority employs to justify its reversal of the jury verdict in this case. By distorting the standards for applying j.n.o.v., the majority produces an opinion based on truncated facts and incomplete law. The outlandish refusal of the majority to consider the article as a whole surfaces throughout its discussion of defamatory meaning, falsity and actual malice. The majority goes to great lengths to avoid imposition of any liability on the *Post*—it whittles down the defamatory meaning of the article, stacks selective facts in an attempt to establish the truth of a stripped-down version of the "set up" charge and fails to acknowledge the clear and convincing evidence that the *Post* published the article with reckless disregard for its truth or falsity. In what it terms an "independent examination of the whole record," the majority ignores very substantial amounts of testimony by credible witnesses, disregards facts contradicting its conclusion and in effect substitutes its own factual determinations for

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a conclusion that the constitutional threshold of clear and convincing proof of actual malice has been met.

those obviously found by the jury. Such methods greatly exceed a court's proper role in independently reviewing libel judgments under the First Amendment. If the majority's analysis is to be upheld in the name of "independent review," the Seventh Amendment right to a jury trial and reexamination of facts according to the rules of the common law will be obliterated. Is such evasive analysis to be upheld as the standard for the future?

The proper course for a reviewing court is to defer to the jury's factual findings and credibility determinations and reevaluate only the legitimacy of the inferences the jury necessarily drew in finding actual malice. The court then must determine whether the facts and reasonable inferences therefrom amount to clear and convincing evidence of reckless disregard for truth or falsity. This is the independent review required by *Bose* and the independent review conducted by this opinion. The jury's verdict should be reinstated.[53] I therefore respectfully dissent.

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[53] The jury awarded William Tavoulareas $250,000 in compensatory damages and $1,800,000 in punitive damages against the *Post*. *Post* revenues in 1979 from circulation and advertising were over $240 million (Tr. 4017). Post-trial motions were made by the defendants in the district court, including motions for a new trial and motions to have the amount of compensatory damages reduced and the award of punitive damages set aside, or in the alternative, reduced. These motions were denied without prejudice when the judgments n.o.v. were granted. Those rulings are not before this court, and there is no occasion to pass on them at this time. However, I would reinstate the jury verdict against the *Post* defendants and Dr. Piro, and in that event the district court on remand would be required to reconsider these related motions. At this time no opinion is expressed on the issues raised by those motions.

Christine Peterson Memorandum

Herr Milius:

I've read the Mobil story several times, and while I'm impressed with the amount of work the reporter obviously did, I'm still left with an overwhelming sense of So What? Is there any way to give this story of high-level nepotism a dollars-and-cents angle? Did Mobil's shareholders lose anything? Mobil's customer?

Parts of Tyler's case against Tavoulareas seem tenuous, and the whole—a $680,00 [sic]-a-year plaything for an indulged son, at worst—just seems like a withered peanut in an 84" gilded shell.

A far more interesting angle, it seems to me, is Mobil's concern about Saudi preference shipping—a concern so profound that it led to the formation of an entire dummy corporation. It's impossible to believe that Tavoulareas alone could put together such a scheme for the sake of his son's business career, or that he would want to.

Aside from all that, I have a couple of specific questions. All are marked on the carbons in Cotter's intype drawer:

* Add 1, graf 1. This is a crucial point—whether or not Tavoulareas the younger put up any investment capital. Perhaps you know who the single source is. I don't, and it seems like a point that should be confirmed by more than one source.

* Same graf. The use of the term "charter"—probably the technically correct term for a shipping contract—has been changed to "contract" to conform with the lead and avoid confusing those accustomed to dealing with land-based enterprises. It's been changed throughout, so if the reporter has a problem with the term, someone should check the galleys.

Peterson Memo

* Add 2, last graf. SEC has reopened investigation. Why? Because the Post is poking around or do they have some independent information?

* Insert A. Sounds weird to say X and So Ltd of London is a Greek shipping firm. Greek-owned, perhaps?

* Add 8, graf 4. Kousi's company has not yet been identified. He's been identified only as a director of Samarco.

* Add 11, graf 1. A fascinating angle. How come the prince didn't put down any cash? And has he repaid any of the loan?

* Add 12, graf 2. No kidding. The story has only said that Atlas used Mobil's office space (talk about a fixed cost!)

* Add 14, graf 3. Four of Atlas' 17 ships were provided by Mobil. Where does a $680,000-a-year operation get the money for the other 13? And whose oil, besides Mobil's, does it transport?

* Add 16, last graf. I presume Hoffman declined an interview. Might be worthwhile to make a separate note of that here, even though we've already covered most of Mobil's folks.

Cass
11/27

Patrick Tyler Memorandum

11/28/79

To: Bill Greider

From: p. tyler [sic]

The thing that genuinely disturbs me about the editor's reaction to the Mobil story is that she is the first person who has read it who didn't find it intrinsically interesting. I think part of the reason for that is that there are an awful lot of paragraphs that we have added in the last week in anticipation of double-truck ads and litigation that give it a turgid, investigative tone (not that it wasn't suffering a little from that already) when a smoother narrative style would make it less unwieldly.

I'm not sure that we can overcome that and still satisfy Howard and Chris that we have plugged all of the little openings that Mobil might come charging through.

Aside from that, the reasons for running the story haven't changed:

* Mobil undertook some incredibly fancy corporate footwork in the wake of the embargo to apparently accomplish two things: ingratiate itself with the Saudis by spinning off shipping equity to the royal family and others (and we acknowledge that there is more that we want to learn about how Mobil did this, i.e. free equity) and set up the son of Mobil's president in a shipping business when business was bad and the business, therefore, stood little chance of prospering without Mobil's help.

* Mobil did both of these things with a minimum of honesty to its shareholders. Our folo story will deal with allegations of outright dishonesty and misuse of Mobil assets.

Tyler Memo

* This is a rare occasion when our readers can get a peek at how decisions are sometimes made at the top of the largest and most important industry in the world.

* Though we acknowledge that what was done was not illegal if fully disclosed, stories of nepotism, reward without merit and favoritism by those who wield vast amounts of power provide the traditional grist of our business in a country that prides itself on having eliminated class distinctions.

To get to some of the other arguments:

We have given this story of high-level nepotism a pretty strong dollars-and-cents angle. We have said that Atlas has done millions of dollars in business operating Mobil ships; we have said the company was formed with no equity investment from Peter Tavoulareas and we have laid out the basics of how the contracts work. But frankly, the story doesn't say that the formation of Atlas and Samarco was a bad business decision that cost Mobil's shareholders money. It doesn't need to say that in order to be a good story. Newspapers write about issues that affect people's pocketbooks, but they also write about power, and glory and politics that help readers understand and how the world works. Our story does show that Mobil's decisions in this case were not made for the traditional business reasons, or for the reasons stated by Mobil.

But one [sic] the money angle, one reason we detail the SEC's involvement, or lack of it, shows that there has not been an objective accounting by an outside agency to determine whether Mobil was giving up economy and efficiency in part of its shipping operations to keep Atlas in business and to buy its way back into Saudi Arabia.

* * * *

Tyler Memo

Because we base a couple of key points in the story on one source, I can see why a good editor might say that part of our case against Tavoulareas seems tenuous. But given the nature of the one-on-one conversations, and the unflagging consistency of our source in repeating his account to the subcommittee and the SEC, I think we have agreed that the source's background, position in the company and overall credibility rule out the possibility of a second source confirmation and warrant our reliance on his account. Further, through no design of ours, this source has been pushed into the spotlight and will be on the record in the follow up story. Thirdly, Tavoulareas, in his own sworn testimony, makes a sufficiently strong case against himself in the follow up and therefore overcomes any reservations we should have about the veracity of the source.

* * * *

The argument that the best angle is Mobil's concern over preference shipping and Mobil's willingness to set up a "dummy" corporation is well taken, but not well thought out. First, we have essentially said that it was not a big surprise that in the wake of the embargo there would be fear in the oil industry that the Saudis would extend their influence to shipping. What is interesting is how Mobil reacted to that. I don't think Mobil's reaction is lost in the story. Indeed, it is the context for understanding how Atlas came about. We looked into the question of whether Mobil essentially paid off the Saudis through Samarco; we included those facts about the partnership that could be ascertained without Mobil's cooperation and hopefully we will learn more about all this after we get our initial effort into the paper. The strength of the reporting centers on the formation of Atlas and may give us a later entree into determining whether Samarco was just another means for putting cash into the pocket of the royal family.

Tyler Memo

It should not seem impossible that Mobil—which originally turned down a chance to join Samarco—changed its mind after it dawned on Mobil's president that such a partnership would justify the creation of a small management firm at a time when Tavoulareas' son was aspiring to such a career and was already at work with one of the Greek shippers. Samarco can be seen as nothing more complicated than a slight diversion from Mobil in the way it moved its crude oil from point A to point B.

The question of "why" Mobil's president would want to orchestrate such a diversion when it would benefit his son's business career in begging things a little.

* * * *

On to the specific questions:

1) Peter's equity. It would be nice to have another source here, but our source was in the best position to know. Moreover, Mobil's president said in his testimony that all Peter had in the way of financial assets at the time was his $14,000 a year salary and "a little bank account." The father said he loaned no money to his son for his stake and doesn't know any details beyond that.

2) Atlas is a Panamanian firm registered in Greece and based in London. Lemos is a Greek firm based in London and New York (and probably other places). I think the "of London" denotes subsidiary or agency status. We can drop it if it is confusing.

3) Good point here. I think we should just say, "Kousi, one of the original Samarco directors, who left the partnership two years ago."

4) We would obviously like to interview Mobil officials to learn more about the equity requirements of the Samarco

partners, but we made it clear that Mobil is not cooperating at this point.

5) I'm afraid I don't understand what the objection or question is here.

6) Atlas gets its management fee from Samarco for the ships that Atlas manages for Samarco. Samarco has more ships than are owned by Mobil. The Mobil ships basically got the business going and provide it with a certain threshold of livelihood. At some point in the last couple of years, Atlas began managing ships for owners other than Samarco because the Samarco business wasn't growing very fast. It is not known what kind of fees are generated by this additional management business, but, presumably, there are additional fees paid by sources outside the partnership.

Secondly, Atlas manages ships on charter to Mobil and other companies as well. In Atlas' early days, it was hauling Mobil crude almost exclusively. But now, many of its latest acquisitions have been dry bulk carriers. Thus, its business has diversified in product and client. (I'm not sure this is something we want to spend any additional time on in the story since it is not terribly relevant.)

7) If we haven't made it clear by add 16 that we went to great lengths to interview Mobil officials familiar with all of this, we never will.

Pat

District Court's Initial Public Figure Order

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civ. A. Nos. 80-3032, 80-2387

June 30, 1982

WILLIAM P. TAVOULAREAS, et al.,

Plaintiffs,

v.

THE WASHINGTON POST COMPANY, et al.,

Defendants.

WILLIAM P. TAVOULAREAS, et al.,

Plaintiffs,

v.

PHILIP PIRO,

Defendant.

ORDER

Currently before the Court are the following motions: (1) *The Post* defendants' motion for summary judgment as to both plaintiff William P. Tavoulareas and plaintiff Peter W. Tavoulareas; (2) *The Post* defendants' motion for judgment on the pleadings as to plaintiff Peter W. Tavoulareas; (3) defendant Sandy Golden's motion for summary judgment; (4) plaintiffs' cross-motion for partial

summary judgment; (5) plaintiffs' motion to compel disclosure of *The Post* defendants' confidential sources; and (6) defendant Philip Piro's motion for judgment on the pleadings. Because the trial date of this action is rapidly approaching, the Court will rule on these motions now and leave for a subsequent memorandum an explanation of its reasoning. Accordingly, upon consideration of the memoranda filed in support of and in opposition to these motions, the arguments of counsel in open court, and the entire record, and for reasons to be stated in a subsequent memorandum, it is by the Court this 30th day of June, 1982,

ORDERED that for the purposes of this lawsuit William P. Tavoulareas be, and hereby is, determined to be a public figure subject to the actual malice standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny; and it is further

ORDERED that for the purposes of this lawsuit plaintiff Peter W. Tavoulareas be, and hereby is, determined to be a private individual, not a public figure subject to the actual malice standard; and it is further

ORDERED that, in all other respects, *The Post* defendants' motion for summary judgment as to both plaintiffs, *The Post* defendants' motion for judgment on the pleadings as to plaintiff Peter W. Tavoulareas, defendant Sandy Golden's motion for summary judgment, defendant Philip Piro's motion for judgment on the pleadings, and plaintiffs' cross-motion for partial summary judgment be, and hereby are, denied; and it is further

ORDERED that plaintiffs' motion to compel disclosure of *The Post* defendants' confidential sources be, and hereby is, denied in part and granted in part; and it is further

Public Figure Order

ORDERED that defendant Sandy Golden disclose to plaintiffs the name of any confidential source with whom he had a tape recorded conversation regarding the subject matter of the articles published by *The Post* on November 30 and December 1, 1979, and any tape recordings of that [sic] conversations; and it is further

ORDERED that, in all other respects, plaintiffs' motion to compel disclosure of *The Post* defendants' confidential sources be, and hereby is, denied.

/s/ .....
Judge

District Court's Supplemental Public Figure Memorandum

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civ. A. Nos. 80-3032, 80-2387

July 26, 1982

WILLIAM P. TAVOULAREAS, et al.,

Plaintiffs,

v.

THE WASHINGTON POST COMPANY, et al.,

Defendants.

WILLIAM P. TAVOULAREAS, et al.,

Plaintiffs,

v.

PHILIP PIRO,

Defendant.

MEMORANDUM

On June 30, 1982, this Court ruled that plaintiff William Tavoulareas would be considered a public figure for the purposes of this lawsuit. The Court subsequently had occasion to review with more care the basis for that brief ruling and concluded that the matter should be reconsidered. The

Court therefore ordered a further hearing on the public figure status of William Tavoulareas on Saturday, July 17, 1982. Following that hearing the parties submitted supplemental briefs on issues raised during those proceedings. For the reasons that follow, the Court has decided to adhere to its earlier ruling that plaintiff William Tavoulareas be considered a public figure for the purposes of this lawsuit.

Upon consideration of the briefs submitted by the parties on the issue of the law to apply in this case, the Court also has concluded that this action will be governed by the law of the District of Columbia, not the law of the State of New York. The reasons for the selection of District of Columbia law over New York law are stated in the second section of this memorandum.

Finally, the Court will use this memorandum to state briefly its reasons for denying the parties' cross-motions for summary judgment on June 30, 1982. This discussion is found in the final section of this memorandum.

I. *The Status of William P. Tavoulareas.*

The question of William Tavoulareas' status as a public or a private figure is determinative of the standard of care to which defendants will be held in this case. If, on the one hand, William P. Tavoulareas is ruled to be a public figure, *see Curtis Publishing Co. v. Butts,* 388 U.S. 130, 155 (1967) (plurality opinion of Harlan, J.); *id.* at 164 (concurring opinion of Warren, C.J.), the standard of care will be that of actual malice as articulated in *New York Times Co. v. Sullivan,* 376 U.S. 254, 279-80 (1964). To recover in a libel action, a public figure must prove not only that defendants published defamatory statements about him, but also that defendants published these statements with knowl-

edge that they were false or with reckless disregard as to their truth or falsity. 376 U.S. at 279-80; *see St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). If, on the other hand, William P. Tavoulareas is ruled to be a private figure for the purposes of this lawsuit, the standard of care to be applied will be that of negligence. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (holding that the states "may define for themselves the appropriate standard of liability for a publisher . . . of defamatory falsehood injurious to a private individual," provided they do not impose liability without fault); Section II *infra* (ruling that District of Columbia law applies to this case). The question of William Tavoulareas' status—a question obviously critical to the lawsuit—is one of law for the Court to decide. *See Waldbaum v. Robert Welch, Inc.*, 627 F.2d 1287, 1293 & n.12 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980).

The Supreme Court has recognized two kinds of public figures subject to the *New York Times* actual malice standard: all purpose public figures and limited purpose public figures. *See Gertz v. Robert Welch, Inc., supra* 418 U.S. at 345. As summarized by the *Gertz* Court,

> In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.

418 U.S. at 351; *see id.* at 345 (defining limited purpose public figures as those who have "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved").

Public Figure Memorandum

The leading case in this Circuit on the issue of the public figure status of individual libel plaintiffs is *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980). The *Waldbaum* decision attempted to flesh out the skeletal descriptions of the two kinds of public figures recognized in the *Gertz* opinion. *Id.* at 1292. In essence, the *Waldbaum* court sought to "formulate 'broad rules of general application' that accommodate the competing interests of press and personal reputation." 627 F.2d at 1292-93 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. at 343-44).

The court first defined the test to apply to determine whether a libel plaintiff is a general or all purpose public figure. Quoting *Gertz*, the court stated that "[a]bsent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life." 627 F.2d at 1292 (quoting 418 U.S. at 352). This test is a strict one and, correspondingly, limits the general purpose public figure to those "rare creature[s]" who attain pervasive fame or notoriety or who assume a "role of especial prominence in the affairs of society." 627 F.2d at 1292, 1294 (quoting *Time, Inc. v. Firestone*, 424 U.S. 448, 453 (1976)); *see Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 165 (1979). Based on these criteria, the *Waldbaum* court concluded that

> a general public figure is a well-known "celebrity," his name a "household word." The public recognizes him and follows his words and deeds, either because it regards his ideas, conduct, or judgment as worthy of its attention or because he actively pursues that consideration.

627 F.2d at 1294.

In light of the preceding discussion, the Court concludes that defendants have failed to establish that William Tavoulareas is an all-purpose public figure as defined by the *Waldbaum* decision. Defendants have not met their burden of showing that plaintiff is "known to a large percentage of the well-informed citizenry." 627 F.2d at 1295 & n.20; *see Reliance Ins. Co.* v. *Barron's*, 442 F. Supp. 1341, 1346 (S.D.N.Y. 1977) (stating that media defendants have the burden of persuasion on the issue of a libel plaintiff's public figure status). All that defendants have established are facts that are not in dispute: William Tavoulareas, as president of Mobil, the second or third largest oil corporation in the United States, is a powerful and influential corporate figure who has ready access to Mobil's publicity apparatus to advance the views of his corporate employer. *See* Defendants' Public Figure Appendix. These facts also describe virtually every other president of a major corporation in America today. Yet the Court cannot conclude from William Tavoulareas' conceded prominence as a businessman that his name is a household word or that he is a celebrity in society at large. Because defendants have failed to show through clear evidence that William Tavoulareas is, in fact, that rare creature —a person of general fame or notoriety in the community— the Court must rule that plaintiff is not a general purpose public figure.

As noted on numerous previous occasions, however, limited purpose public figures are a much more common phenomenon in society. *See, e.g., Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 164 (1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. at 345, 351. Again, the *Waldbaum* decision provides the basic framework for analyzing William Tavoulareas' status as a limited purpose public figure.

Public Figure Memorandum

The *Waldbaum* court articulated a three step inquiry a trial court must conduct to resolve whether a libel plaintiff has become a limited purpose public figure by thrusting himself to the forefront of a particular public controversy. As a first step, the Court must isolate the particular public controversy at issue. 627 F.2d at 1296-97. After defining the contours of the public controversy, the Court must determine the nature of plaintiff's role in that controversy. *Id.* at 1297-98. To be classified a limited purpose public figure as to a particular controversy, the plaintiff must have achieved some "special prominence" in the debate. *Id.* at 1297 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. at 351). Finally, the court must decide whether the alleged defamation related to the plaintiff's role in the controversy as defined. 627 F.2d at 1298. If unrelated to the controversy, defamatory statements are unentitled to the protection afforded by the actual malice rule of *New York Times. Id.*

The present inquiry will focus on the first step in the analysis set forth in the *Waldbaum* decision because the Court is convinced that resolution of the public controversy question is dispositive of the limited purpose public figure issue in this case. If the Mobil-Atlas-Samarco relationship constituted a public controversy, or fell within a larger public controversy over the special relationship between Mobil and Saudi Arabia, *prior to* the publication of the November 30 and December 1, 1979, articles challenged in this suit, the Court has no doubt that William Tavoulareas met the second and third criteria of the limited purpose public figure test enunciated by *Waldbaum.* As to the second criterion—the plaintiff's participation in the public controversy—William Tavoulareas undeniably played an important role at least in the conception of

Samarco as a joint American-Saudi Arabian shipping concern and in the formulation of the idea for an independent ship management company in the nature of Atlas. He also is the chief architect of Mobil's special relationship with the Saudi Arabians. With regard to the third requirement, the alleged defamations unquestionably concerned one aspect of the overall Mobil-Saudi Arabian relationship or, more narrowly, of the specific Mobil-Atlas-Samarco relationship: the participation of William Tavoulareas' son as an equity partner in the independent ship management company, Atlas, engaged by Samarco to run its operations. Assuming, therefore, some preexisting public controversy concerning Mobil's role in Saudi Arabia or the Mobil-Atlas-Samarco relationship, the Court would conclude that William Tavoulareas was a limited purpose public figure on the date *The Post* published the articles at issue in this lawsuit.

Upon a review of all the evidence submitted by the defendants, the Court is convinced that defendants have established the existence of a public controversy over Mobil's (and William Tavoulareas') business dealings in Saudi Arabia and also over Mobil's (and William Tavoulareas') role in Samarco and its business relations—through Samarco—with Atlas *prior* to the publication of *The Post's* two articles on the subject. Consequently, William Tavoulareas will be considered a public figure for the purposes of press commentary on those relationships.

As the *Waldbaum* case set forth in considerable detail, "a public controversy is a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants." 627 F.2d 1296. Simple newsworthiness alone is insufficient to raise an issue to the level of a public dispute. *Id.* at 1296; *see Hutchinson v. Proxmire,* 443 U.S. 111, 135 (1979). Rather, "courts

must look to what already were disputes." 627 F.2d at 1297. To determine whether a controversy in fact existed and, if so, to define its dimensions, the court

> must examine whether persons actually were discussing some specific question. A general concern or interest will not suffice. The court can see if the press was covering the debate, reporting what people were saying and uncovering facts and theories to help the public formulate some judgment. . . . If the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants, it was a public controversy.

627 F.2d at 1297 (citations and footnotes omitted).

Applying these standards, the Court has concluded that defendants have established that a public controversy regarding Mobil's dealings with Saudi Arabia and the Mobil-Atlas-Samarco relationship existed prior to November 30, 1979. Defendants' basic contention is that the two articles "concern Mr. Tavoulareas' activities as President, chief operating officer and Director of Mobil Corporation, and concern issues involving the international carriage of oil, relations with Saudi Arabia, meeting oil supply needs, and the conduct of an international oil company and its officials." Defendants' Memorandum of Points and Authorities in Support of Motion for Summary Judgment at 3-4 [Defendants' Main Memorandum]. In effect, defendants assert that because the articles related to William Tavoulareas' official duties as the president of Mobil, the second or third largest oil company, and because Mobil, and the oil industry in general, have engendered considerable public controversy over the last decade, the specific corporate transactions depicted in the articles constituted a public controversy for

the purposes of press coverage. Defendants also argue that William Tavoulareas is not a wall-flower, low-visibility corporate president—one whose vision is "limited to the balance sheet." 627 F.2d at 1300. Rather, defendants point to the massive public figure index on plaintiff to support their contention that William Tavoulareas "is an activist, projecting his image and that of [Mobil] far beyond the dollars and cents aspects of [the oil business]." Defendants' Main Memorandum at 4 (quoting *Waldbaum v. Fairchild Pub., Inc.*, 627 F.2d at 1300). For these reasons, defendants argue that William Tavoulareas is a limited purpose public figure for the limited purpose of commenting upon his inherently public—and controversial—official activities as president of Mobil and, specifically, upon his activities as they relate to Mobil's special relationship with Saudi Arabia.

The Court agrees that, viewed from the eyes of a reasonable person, *see Waldbaum v. Fairchild Pub., Inc., supra,* 627 F.2d at 1292, the activities of Mobil and William Tavoulareas with regard to Saudi Arabia, in general, and Samarco and Atlas, in particular, constituted a pre-existing public controversy for the purposes of press commentary under the first amendment. The evidence submitted by defendants indicates what is, in fact, common knowledge: Mobil is "an innovative company often the subject of news reports. As the second largest [oil company] in the nation, [Mobil] attracted attention, and its pathbreaking [policies in dealing with Saudi Arabia following the nationalization of Aramco] became the subject of public debate within the [oil] industry and beyond, debate that would affect consumers and retailers" throughout the nation. *Waldbaum v. Fairchild Pub., Inc., Inc., supra,* 627 F.2d at 1299. As all the evidence to date reveals, Mobil pioneered a new path

in dealing with Saudi Arabia following the nationalization of the interests of the Aramco partners, including Mobil, in the wake of the 1973 oil embargo. Rather than fighting the inevitable, Mobil, unlike its Aramco partners, consciously chose to cooperate with Saudi Arabia's effort to assume control over its only major natural resource: oil. The major architect of that policy, the man who initiated, cultivated, and nurtured Mobil's special relationship with the Saudis, is William Tavoulareas. As with Eric Waldbaum's role at his company, William Tavoulareas "was the mover and shaper" of Mobil's policy in Saudi Arabia. *Waldbaum v. Fairchild Pub., Inc., supra,* 627 F.2d at 1300. With regard to Mobil's participation in the Samarco-Atlas venture, and especially with regard to William Tavoulareas' personal role in that venture, William Tavoulareas must be ruled a limited purpose public figure. He has "assumed the risk that the press, in covering the controversy, will examine the major participants with a critical eye." *Waldbaum v. Fairchild Pub., Inc., supra,* 627 F.2d at 1298; *see Miller v. Transamerican Press, Inc.,* 621 F.2d 721, 724 (5th Cir. 1980) (holding that "a high-ranking official of a union of tremendous importance to our economy, as relates to his official duties, is a public figure"), *cert. denied,* 450 U.S. 1041 (1981); *Chuy v. Philadelphia Eagles Football Club,* 595 F.2d 1265, 1280 (3d Cir. 1979) (en banc), (holding that a professional athlete is a public figure with regard to his playing performance).

The Court's conclusion is buttressed by William Tavoulareas' access to the media—primarily through Mobil's public affairs department—and his ability to respond with his version of the facts depicted in the two articles in question. As one of the most dynamic and successful businessmen in the nation, and as president of Mobil, he has far

more access to the press than the vast majority of citizens in this country. The public figure index submitted by defendants indicates that Mr. Tavoulareas' access to the media is especially great when the subject matter concerns the affairs of Mobil or of the oil industry. In short, he commands the attention of the press when he comments on the oil industry's relationship with the Arab world, in general, or on Mobil's relationship with Saudi Arabia, in particular. Mr. Tavoulareas' access to the media on these subjects is confirmed by his ability to command coverage of his side of the facts in this very case. William Tavoulareas' "prominence and the availability of self-help through press coverage of responses," therefore, is further evidence of his status as a public figure for the purposes of media commentary on aspects of the Mobil-Atlas-Samarco relationship, including the role of his son in Atlas. *Waldbaum v. Fairchild Pub., Inc., supra,* 627 F.2d at 1295 (discussing general purpose public figures).

On June 30th, the Court rejected defendants' claim that William Tavoulareas' son, Peter, be considered a public figure for the purposes of this litigation. The Court also adheres to this ruling. The fact that the president of Mobil is a public figure for the limited purposes of commenting on Mobil's activities in Saudi Arabia does not make his son a limited purpose public figure. Defendants have failed to establish that Peter attained the prominence of his father with regard to affairs in Saudi Arabia. He also lacks his father's ability to respond to public or press criticism of his activities. In sum, defendants have not met their burden of showing that Peter Tavoulareas is a limited purpose public figure.

II. *Choice of Law*

The Court's ruling that Peter W. Tavoulareas is a private figure raises a choice of law question on the standard of care to which defendants will be held as to him. Plaintiffs argue for the application of District of Columbia law, defendants for the application of New York law. The difference between the law of these two jurisdictions is quite substantial on the issue of the standard of care to be applied in libel actions. The District of Columbia permits a recovery against the publisher of a defamatory statement on a showing that the publisher acted negligently. *See Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 80 (D.C. 1980), *cert. denied*, 451 U.S. 989 (1981). In contrast, New York allows liability to be imposed on the publisher of a defamatory falsehood only upon proof that the publisher acted in a "grossly irresponsible manner." *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 199, 379 N.Y.S.2d 61, 64, 341 N.E.2d 569, 571 (1975).

In diversity actions, a federal district court applies the substantive law of the forum, including the choice of law rules prevailing in that jurisdiction. *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). The present forum, the District of Columbia, has adopted the "governmental interest analysis" approach to resolve questions concerning choice of law. *See Semler v. Psychiatric Institute of Washington, D.C., Inc.*, 575 F.2d 922, 924 (D.C. Cir. 1978); *Tramontana v. S.A. Empresa De Viacao Aerea Rio Grandense*, 350 F.2d 468, 471-76 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 943 (1966). The term "interest analysis" is simply a shorthand way of saying that District of Columbia courts apply the law of the state or jurisdiction with the most significant interest in the resolution of the

particular controversy being litigated. *See Blair v. Prudential Ins. Co.*, 472 F.2d 1356, 1359 (D.C. Cir. 1972). The court evaluates the governmental policies underlying the conflicting state laws and determines which state's policy would be advanced the most by an application of its law to the facts of the case under review. *Williams v. Williams*, 390 A.2d 4, 5-6 (D.C. 1978).

The policy underlying the law of the District of Columbia regarding the standard of care in private figure libel actions is succinctly stated in the *Phillips* case:

> The common law of defamation in the District of Columbia has long sought to provide the defamed plaintiff a maximum standard of protection. . . .

424 A.2d at 87 (adopting decision of trial court). Since *Gertz v. Robert Welch, Inc.*, 418 U.S. at 347, eliminated liability without fault—strict liability—as a proper standard of care in defamation cases, the District of Columbia has adopted the next most stringent standard of care—negligence. 424 A.2d at 87. Newspapers and other publishers of defamatory material in the District of Columbia are thus held to the highest standard of care permitted under the Constitution in a private figure libel suit. The policies underlying this choice of law are (1) to encourage the greatest degree of responsibility by the media and (2) to afford the maximum protection possible to the reputational interests of private figures.

In comparison, New York law tips the balance between individual reputation and freedom of the press decidedly in favor of the latter interest when the defamatory material falls "within the sphere of legitimate public concern." *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 199, 379 N.Y.S.2d 61, 64, 341 N.E.2d 569, 571

(1975). When the press publishes within this sphere, New York law permits a private figure libel plaintiff to recover only on proof that a publisher has "acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." *Id.* The purpose of New York law is essentially to foster the greatest amount of freedom of the press. The law minimizes the possibility of press self-censorship that arises from the threat of huge damage awards in libel suits.

With these considerations in mind, the Court has concluded that the District of Columbia has the most significant contacts with, and interest in, the resolution of this lawsuit. The only real contact that the subject matter of this lawsuit has with New York is the fact that Peter Tavoulareas' father, William Tavoulareas, resides in Sands Point, New York. William Tavoulareas, however, is a public figure who is bound by the constitutional standard of actual malice imposed by the *New York Times* decision. The focus of this choice of law inquiry is Peter Tavoulareas, and Peter resides not in New York, but in London, England. *The Post*, moreover, is not a New York newspaper, but a Washington, D.C. publication. Other than the fact that *The Post* circulates in New York (to a far lesser degree than in the District of Columbia area), New York has no significant contacts with this litigation insofar as the suit pertains to Peter Tavoulareas.

In comparison, the District of Columbia has far more significant contacts, both quantitatively and qualitatively, with this litigation. Correspondingly, the interests underlying D.C. law will be advanced the most by the application of that law. This jurisdiction's interest in extending to private individuals the greatest protection to their reputations

will be furthered because the injury, if any, that Peter Tavoulareas incurred in the United States from the publication of the two *Post* articles occurred primarily in the District of Columbia. The Dingell subcommittee investigation occurred here, as well as the more extensive, and more serious, SEC investigation. This is the forum in which both Peter, and William, Tavoulareas were principally called upon by the federal government to defend the charges lodged against them. The Court thus concludes that the District of Columbia's interest in affording the greatest degree of protection to Peter Tavoulareas' reputation is best served by application of the law of this forum.

The District of Columbia is also the place in which the most extensive and influential publication of the alleged defamations occurred. This conclusion derives from the fact that the District is the place in which defendants principally investigated, researched, wrote, edited, and published the November 30 and December 1, 1979, articles about the plaintiffs. To the extent that District of Columbia libel law is concerned with encouraging the press to report the news accurately and responsibly within the District, this interest is furthered by holding District of Columbia publications to the higher standard of care imposed here. This consideration, therefore, also convinces the Court that the law governing the resolution of this case should be that of the District of Columbia.

III. *Summary Judgment*

In a brief order on June 30, 1982, the Court denied, with the exception of the public/private figure issue as to each plaintiff, the following motions for summary judgment or for judgment on the pleadings: (1) defendant Golden's individual motion for summary judgment; (2) *The Post*

defendants' motion for judgment on the pleadings as to plaintiff Peter Tavoulareas; (3) *The Post* defendants' motion for summary judgment as to both plaintiff William Tavoulareas and plaintiff Peter Tavoulareas; (4) plaintiffs' counter-motion for partial summary judgment; and (5) defendant Piro's motion for judgment on the pleadings. Briefly stated, the Court concluded (1) that, on the record then developed, genuine issues of material fact existed that precluded the grant of summary judgment as to any of the named parties and (2) that the legal bases for the two motions for judgment on the pleadings were unconvincing. The Court will discuss the June 30th rulings in reverse order of difficulty.

Defendant Piro's motion for judgment on the pleadings rested on two grounds. First, he argued that plaintiffs' complaint failed to allege any statements that were defamatory *per se*. From this assumption, Piro then argued that the complaint alleged nothing more than trade disparagement—injurious falsehood to business—and that the complaint therefore failed to state a cause of action because plaintiffs alleged no special damages, a prerequisite to recovery on a trade disparagement claim. The Court rejected this argument because the complaint in fact set forth several allegations of defamation *per se*, including a statement that imputed to plaintiffs a criminal act. *See Restatement (Second) of Torts* § 570(a) (1977). Piro's second ground for judgment on the pleadings incorporated *The Post* defendants' arguments for summary judgment and for judgment on the pleadings as to Peter Tavoulareas. Because the Court rejected *The Post's* motions, this ground for defendant Piro's motion also fell.

The Court also rejected plaintiffs' motion for partial summary judgment on the issue of actual malice or other

fault and on the issue of the applicability of the "fair report" or "neutral reportage" privileges to the December 1, 1979, article. The Court viewed this motion as essentially frivolous because of the existence of numerous genuine issues of material fact both as to existence of any fault by defendants and as to the applicability of a privilege to report Representative Dingell's charges against plaintiffs.

Defendants' motion for summary judgment rested on three grounds: (1) the lack of actual malice in the publication of the two articles (assuming one or both plaintiffs to be public figures); (2) the lack of fault in publication of the two articles (assuming one or both plaintiffs to be private figures); and (3) the applicability of the fair report or neutral reportage privileges to protect the publication of the December 1, 1979, article. Again, however, the Court viewed these issues as inappropriate for summary judgment at that stage of the proceedings because the record reflected genuine issues of material fact that remained contested. The Court therefore concluded that plaintiffs were entitled to present their proof on these issues to a jury.

Defendants' motion for judgment on the pleadings as to plaintiff Peter Tavoulareas rested on the ground that any statements in the two articles either (1) were incapable of a defamatory meaning or (2) were protected expressions of opinion. The Court agreed with defendants that, as a threshold matter, whether the words complained of are capable of a defamatory meaning is a question of law for the judge to decide. *See Cianci v. New Times Pub. Co.*, 639 F.2d 54, 60 (2d Cir. 1980); *Restatement (Second) of Torts* § 614 (1977). To be defamatory, the words alleged must "reflect[] upon the [plaintiff's] character." W. Prosser, *Handbook of the Law of Torts* § 111, at 739 (4th ed. 1971). The language or statement must "expose the plaintiff to

public contempt, ridicule, aversion, or disgrace, or induce evil opinion of him in the minds of right-thinking persons, and . . . deprive him of their friendly intercourse in society." *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 375, 397 N.Y.S.2d 943, 949, 366 N.E.2d 1299, 1305, *cert. denied*, 434 U.S. 969 (1977). At the least, the words must "injure plaintiff in his trade, profession or community standing, or lower him in the estimation of the community." *Olinger v. American Savings & Loan Ass'n*, 409 F.2d 142, 144 (D.C. Cir. 1969) (quoting *Afro-American Pub. Co. v. Jaffe*, 366 F.2d 649, 654 (D.C. Cir. 1966) (en banc)); *see Restatement (Second) of Torts* § 559, comment b (1977).

With these principles in mind, and after a thorough review of the articles, the Court denied defendants' motion because of its conclusion that the alleged defamatory statements as to plaintiff Peter Tavoulareas were reasonably capable of bearing a defamatory meaning. *See Levy v. American Mutual Liability Ins. Co.*, 196 A.2d 475, 476 (D.C. 1964). The words of the November 30th and December 1st articles are capable of being read by a reasonable person so as to subject plaintiff Peter Tavoulareas to public contempt, ridicule, aversion, or disgrace or to injure him in his trade, profession or community. *See Restatement (Second) of Torts* § 559, comment b, § 563, comment c (1977). Consequently, the Court rejected this ground for defendant's motion.

As to defendants' second ground for judgment on the pleadings, the opinion privilege, the Court could not conclude that the two articles consisted of "pure opinion" subject to any absolute first amendment protection. *Cianci v. New Times Pub. Co., supra*, 639 F.2d at 63, 66. The articles as a whole, and the statements specifically alleged as defamatory in the complaint, are laden with factual representations. False statements of fact are not protected

by the first amendment. *See Gertz v. Robert Welch, Inc., supra,* 323 U.S. at 40. On a motion for judgment on the pleadings, the Court could not accept defendants' contention that the complaint alleged as defamatory only protected statements of opinion.

Finally, the Court's June 30th order rejected defendant Golden's motion for summary judgment. Defendant Golden's motion rested on the ground that the uncontested record conclusively established that he had no participation in or control over the publication of either the November 30th or the December 1st articles published by *The Post.* He advanced this argument despite his designation as a "special correspondent" on the November 30th article. Because the extent of defendant Golden's participation in the publication of the two articles was unclear, and was vigorously contested by plaintiffs, the Court felt constrained to deny his motion. Simply put, the record reflected genuine issues of material fact on the questions whether Golden contributed to the publication of the articles beyond leading defendant Tyler to one source or whether he aided or abetted the publication of the two articles in some other meaningful way.

CONCLUSION

For the foregoing reasons, the Court adheres to its previous rulings on the plaintiffs' status as libel plaintiffs and concludes that District of Columbia law governs the disposition of this case.

/s/ .....
Judge

July 26th 1982

Order Granting Rehearing *En Banc*

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

June 11, 1985

No. 83-1604

WILLIAM P. TAVOULAREAS and PETER TAVOULARES

v.

PHILIP PIRO

And Consolidated Case No. 83-1605

Before:

Robinson, *Chief Judge;* Wright, Tamm, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, *Circuit Judges*

ORDER

Appellees' suggestions for rehearing *en banc* have been circulated to the full Court. A majority of the judges in regular active service have voted in favor thereof. Accordingly, it is

ORDERED, by the Court *en banc,* that these cases will be reheard by the Court sitting *en banc,* and it is

FURTHER ORDERED, by the Court *en banc,* that this Court's Judgment and opinion of April 9, 1985, are vacated

except to the extent they affirmed the judgment of the District Court notwithstanding the verdict in favor of appellee Sandy Golden. And, it is

FURTHER ORDERED, by the Court *en banc*, on its own motion, that the opinion of the panel majority on denial of the petition for panel rehearing, issued this date, be, and the same hereby is, vacated, and it is

FURTHER ORDERED, by the Court *en banc*, that the Clerk is directed to issue a partial mandate with respect to the portions of the opinion and judgment of April 9, 1985, affirming the judgment notwithstanding the verdict in favor of appellee Golden.

Counsel will be advised by a subsequent order of the future course of proceedings in these cases.

Per Curiam
For the Court
GEORGE A. FISHER, *Clerk*

By: ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

Circuit Judges Tamm and Scalia would deny the suggestions for rehearing *en banc*.

Circuit Judge Bork did not participate in this order.